Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

SUMMIT FINANCIAL HOLDINGS, LTD.,

Petitioner,

v.

CONTINENTAL LAWYERS TITLE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the state court's decision, which cannot be reconciled with state statutes creating a duty of due care, violates due process where it impermissibly shifts the burden of proof and is not supported by substantial evidence.

2 Does a title company, with actual notice of a recorded assignment of deed of trust, owe a duty of due care to the beneficiary of record, when the title company mistakenly pays the wrong party and subsequently reconveys the beneficiaries recorded deed of trust.

PARTIES TO THE PROCEEDING

PETITIONER: Summit Financial Holdings, Ltd. Is a British Virgin Island corporation engaged in interstate commerce in the United States.

RESPONDENT: Continental Lawyers Title Insurance Company is a wholly owned subsidiary of Lawyers Title Insurance Corporation

AMICUS CURIAE: California Land Title Association, is an association granted Amicus Curiae status by the California Supreme Court to support Respondent

AMICUS CURIAE: American Insurance Association, is an association granted Amicus Curiae status by the California Supreme Court to support Respondent

AMICUS CURIAE: Association of Southern California Defense Counsel, is an association granted Amicus Curiae status by the California Supreme Court to support Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

SUMMIT FINANCIAL HOLDINGS, LTD., Petitioner, by undersigned counsel, under appropriate rules of this court, request that this Court issue a Writ of Certiorari to the California Supreme Court.

OPINIONS BELOW

Petitioner was the assignee and record beneficiary of a deed of trust and related promissory note made by John Furnish in the amount of $425,000.00. In order to pay off this indebtedness Furnish entered into a refinancing transaction with Dundrel Securities. As part of the Furnish/Dundrel transaction Respondent Continental Layers Title Company acted as escrow holder and distributed all funds. During the processing of the refinance CLTC never even attempted to contact Summit despite CLTS's actual knowledge of the record title in Summits name. CLTC mistakenly paid the loan proceeds to Talbert Financial (the original holder and Petitioners assignor) instead of Petitioner. CLTC then, in violation of Civil code section 2941 reconveyed

Petitioner filed suit in Orange county Superior Court and prevailed on its Negligence and Violation of Statute (CLTC violated Civil Code Section 2941 by wrongfully reconveying Summits Deed of Trust neither appellate court disturbed this finding).

The Fourth District Court of Appeals reversed the trial court, holding that CLTC owed no duty of due care to Petitioner.

The California Supreme Court granted review and affirmed the Court of Appeals. A petition for rehearing was denied May 15, 2002.

JURISDICTION

The opinion of the California Supreme Court was filed March 7, 2002. An order denying rehearing was entered on May 15, 2002.

This courts jurisdiction is based upon 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Civil Code Section 1714 (a) provides:

> Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.

U.S. Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. The Loan

In August 1994 Furnish borrowed $425,000 from Talbert Financial, and signed the note payable to Talbert Financial. The note was secured by the deed of trust on the property.

At the same time the deed of trust was recorded, a document entitled "Assignment of Deed of Trust" was recorded that assigned the beneficial interest under the note and deed of trust from Talbert to Summit.

B. The Refinance

In September 1995, in order to satisfy his debt to Summit, Furnish obtained a new loan from Dundrel Securities (Dundrel). Furnish and Dundrel employed Beverly Hills Escrow (BHE) to handle part of the refinancing transaction, and CLTC acted as an escrow holder in connection with issuing the title insurance for the new deed of trust securing the new note payable to Dundrel. CLTC held and distributed all loan proceeds.

CLTC prepared a preliminary title report noting (at item 6) that the property was encumbered by a deed of trust securing the Talbert note, and that an assignment of the note and deed of trust from Talbert to Summit had been recorded. BHE thereafter obtained a note payoff demand from Talbert. There were no servicing or other agreements between Talbert and Summit. The Furnish deed of trust and promissory note were assigned to Summit without recourse. At no time did CLTC even attempt to contact the beneficiary of record, Summit, to ascertain whether there was a party, other than the recorded beneficiary whom should receive the payoff funds.

On close of the refinancing transaction, CLTC paid Talbert from funds deposited with CLTC by Dundrel.

C. The Legal Proceedings

In February 1997 Furnish filed for protection under chapter 11 of the United States Bankruptcy Code (11 U.S.C.), and in April 1997 the bankruptcy court entered an order for sale of the property free and clear of all liens. The order directed that the proceeds of the sale be used to pay the amounts owed the first trust deed holder, Dundrel, and amounts owed to another secured creditor, and that any purported liens on the property held by other parties, including Summit, would attach to the remaining proceeds of the sale. In July 1997 Furnish moved in the bankruptcy court for an order disallowing Summit' s lien claim on the remaining proceeds from the sale of the property. Furnish argued the amount he paid Talbert in 1995 in the refinance transaction fully extinguished Furnish' s obligations under the note. He established that he never received notice of the assignment of the deed of trust, [and he contended that notice was] required by section 2937, subdivision (d), and [that] under section 2937, subdivision (f), a debtor' s payment to the prior note holder before receiving notice of the assignment pro tanto extinguishes the underlying obligation. The payment to Talbert therefore[, Furnish argued,] fully extinguished the note. Summit opposed the motion, arguing that (1) the recorded assignment of the note and deed of trust was adequate to provide constructive notice of the transfer from Talbert to Summit, and (2) in any event Furnish received a notice that complied with section 2937, subdivision (d). The bankruptcy court concluded Furnish was not given the notice required by section 2937, subdivision (d) and the payment to Talbert extinguished the note under section 2937, subdivision (f). It therefore disallowed Summit' s lien claim on the remaining proceeds for the sale of the property.

In the trial court proceeding, Summit sought recovery from CLTC of the note payment CLTC made to Talbert, contending that CLTC was negligent by making the note payment to Talbert rather than to Summit. The trial court concluded Kirby was controlling and that CLTC owed a duty of care to Summit. The trial court further found that CLTC

was negligent [and] breached its duty of care to Summit, and [that] CLTC' s negligence was a proximate cause of Summit' s injury. Accordingly, the trial court entered judgment for damages in favor of Summit against CLTC.

The Court of Appeal reversed on the ground that Summit, being a stranger to the escrow, was not owed a duty of care by CLTC.

Summit appealed to the California Supreme Court. The California Supreme Court affirmed the court of appeals. The California Supreme Court based its decision upon the contention that CLTC owed no duty of due care to Summit. Summit argued that the California Legislature in enacting Civil Code Section 1714(a) had created a general duty of due care and that under prior decisions of the California Supreme Court a departure from that duty should only be granted following a clear showing of public policy reasons.

The actions of the California Supreme Court in refusing to apply C.C. §1714(a) resulted in a shifting of the burden of proof violating the fundamental fairness requirements of due process as required by the Fifth Amendment to the US Constitution.

WHY CERTIORARI SHOULD BE GRANTED

I. RESPONDENT OWED PETITIONER A DUTY OF DUE CARE.

Since Appellant had **actual notice** of Respondent's **recorded** interest, it was certainly foreseeable that if due care was not used (as indeed it was not) damage would be suffered by Respondent (as both trial and appellate courts found to have been the case).

The law of negligence is clear on the issue of assumption of duty: when one undertakes to act, he must do so with due care. C.C. §1714(a); *Rowland v. Christian*, (1968) 69 C2d 108;112 See also (*Valdez v. Taylor Automobile Co.*, 129 Cal.App.2d 810, 817, . "[If] the defendant enters upon an affirmative course of conduct affecting the interests of another, he is regarded as assuming a duty to act, and will

thereafter be liable for negligent acts or omissions . . .") and *Warner v Santa Catalina Island Co.* (1955) 44 Cal 2d 310, ("All persons are required to use ordinary care to prevent others from being injured as a result of their conduct.")

Simply stated: Appellant knew Respondent was the holder/beneficiary of record and had a right to receive the payoff funds, Appellant, (acting as escrow agent) had those very funds, and when Appellant acted to disburse those funds it had a duty to use due care so as not to damage Respondent's right to receive its payment. It also had a duty to use due care before recording a reconveyance of Summits trust deed.

Continental's admitted knowledge and the nature of the subject transaction make the foreseeability of harm apparent to the ordinary reasonably prudent person.

II. CIVIL CODE SECTION 1714(A) AND THE BURDEN OF PROOF

California law, as set forth in CC 1714(a) creates a general duty of due care which the trial court acknowledged as protecting Summits property rights (A promissory note is personal property (Civ. Code, §§ 657, 663).

Petitioner prevailed at trial on its negligence claims. Petitioner alleged that CLTC owed it a duty of due care pursuant to Civil Code Section 1714(a).

Civil Code Section 1714(a) creates a general duty of due care to all persons to act prudently and avoid causing harm to others. The California courts have traditionally acknowledged this general duty of due care.

> "...we begin always with the command of . . . section 1714, subdivision (a): 'Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . . .' " (*Christensen v. Superior Court* (1991) 54 Cal. 3d 868, 885, 820 P.2d

181.)

> The first touchstone has been *set by the Legislature*, with the fundamental precept that "every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . . ." (Civ. Code, § 1714, subd. (a).) **This court has, naturally, been chary of exceptions to the legislative rule: "Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exemption to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.**" (Rowland v. Christian (1968) 69 Cal. 2d 108, 112 .) Merrill v. Navegar, Inc., 26 Cal. 4th 465 at P501-502 (Dissent)(emphasis added)

> "..Civil Code section 1714's fundamental command that everyone be responsible for lack of care in the management of his or her property". Marilyn Merrill et al., v. Navegar, INC., 26 Cal. 4th 465 2001 p510 (Dissent)

Before judicially establishing an **exception** based on public policy, courts consider a variety of factors. *Rowland*, supra, at 112. This holding shows that the duty created by CC 1714(a) attaches prior to any judicial analysis creating an exception to or attenuating said duty.

CLTC has cited no legislatively mandated exception to CC 1714(a) applicable to the instant case. CLTC has also not shown a clear public policy exception to the mandated duty

The Supreme Court of California has recognized that a *departure* from the standard set forth in section 1714 required a balancing of several policy factors. Rowland, 443 P.2d at 564, 69 Cal. 2d at 100. Specifically, these factors are: the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Both the court of appeals and the California Supreme Court disregarded the legislatures valid exercise of its power to legislate for the health safety and welfare (by enacting C.C. §1714(a)) and to impose a "balancing" test *prior to or in lieu of* the clearly defined and applicable statute in the case at bar. The California legislature has thus been deprived of its constitutionally granted powers to legislate the public policy of the State of California on at least this issue

The imposition of a "balancing" test prior to the application of C.C.§1714(a) violates the precepts of Due Process and fundamental fairness.

As enacted by the California legislature Petitioner was entitled to the protection of C.C.§1714(a). As is evident from the courts prior decisions and the plain meaning of C.C.§1714(a) Petitioner satisfied its burden of proof by pleading the statutorily enacted duty. The burden of proof then shifted to CLTC to show that clear public policy warranted an exception to the application of the general duty of care. *Rowland v. Christian (1968) 69 Cal. 2d 108, 112* .

In the instant case the Supreme Court did not hold CLTC to its burden of proof, instead, it embarked upon a balancing test applying factors intended to be used in deciding whether to *exempt* someone from the general duty and erroneously found that Petitioner had "failed to establish the existence of a duty". CLTC has never met its burden of showing clear public policy reasons why it should be exempt from the general duty of due care mandated by C.C. §1714(a).

If the statute is not interpreted as creating a general duty and applied first, with all "balancing" being done to determine public policy exceptions, then it means nothing and the California Courts would be free to make their own law and render the California legislature's act meaningless. This could hardly be the intent of the legislature when it promulgated C.C.§1714(a).

Due process is never served by disregarding the properly enacted statutes and intent of the legislature. Due process is never served by disregarding the existing law and shifting the burden of proof to one who should not bear that burden, particularly where that litigant has already met its initial burden by pleading the protection of a valid statute, as herein.

III. THE CALIFORNIA SUPREME COURT'S OPINION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND THEREFORE VIOLATES DUE PROCESS

It is understood this court is reluctant to confront unresolved factual issues. However, in the instant matter the California Supreme Court has based its decision upon mistakes and erroneous facts. Due process requires fundamental fairness.

The California Supreme Court on several occasions in the Summit opinion analyizes the case upon a purported fiduciary duty. However, Summit sued upon negligence. To analyize Summits claim using the higher fiduciary standard is both unfair and incorrect.

Next, The California Supreme Court as well as the court of appeals purports to base its ruling on the concept that it was unforseeable that Talbert would not turn over the Furnish payoff funds to Summit *as it had agreed to do [sic].* However, the record is clear: Talbert never had any contract or agreement with Summit, only an assignment, *Without Recourse.* There was no servicing agreement or any other agency between Talbert and Summit. For the court to apply phantom facts to deny Summits claims violates the heart of

fundamental fairness and is unworthy of that court.

Another disturbing error by the California Courts is the repeated edict that Summit was a stranger to the Furnish/Dundrel escrow. It is beyond dispute that Furnish entered into the Dundrel transaction to pay off his indebtedness to Summit, as represented by the promissory note and deed of trust held by Summit. Under California law Summit was a third party beneficiary to the entire agreement between Furnish and Dundrel, and the escrow was of course one part of that agreement.

The Due Process Clause serves two basic goals. One is to produce, through the use of fair procedures, more accurate results: to prevent the wrongful deprivation of interests. The other goal is to make people feel that the government has treated them fairly by, say, listening to their side of the story.

An opinion so flawed violates the very heart of Due Process: Fundamental fairness.

CONCLUSION

THEREFORE, Petitioner Summit Financial holdings, Ltd. Respectfully requests this court GRANT its Petition for a Writ of Certiorari to the California Supreme Court.

Respectfully submitted,

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(Any footnotes trail the end of each document.)
S097344

SUPREME COURT OF CALIFORNIA

SUMMIT FINANCIAL HOLDINGS, LTD.,
Plaintiff and Respondent,

v.

CONTINENTAL LAWYERS TITLE COMPANY,
Defendant and Appellant.

March 7, 2002, Filed

COUNSEL:
For Appellant: Wolf, Rifkin & Shapiro and Marc E. Rohatiner for Defendant and Appellant.

Billet, Kaplan & Dawley and Terry S. Kaplan for California Land Title Association as Amicus Curiae on behalf of Defendant and Appellant.

Stephan, Oringher, Richman & Theodora, Harry W. R. Chamberlain II, Robert M. Dato; Robie & Matthai, Edith M. Matthai and Pamela E. Dunn for American Insurance Association and Association of Southern California Defense Counsel as Amici Curiae on behalf of Defendant and Appellant.

For Respondent: Doumani & Grandon, Grandon & Associates, Robert M. Grandon; Callahan & Blaine and Jim P. Mahacek for Plaintiff and Respondent.

JUDGES:
BROWN, J. WE CONCUR: GEORGE, C.J., KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J., MORENO, J. CONCURRING OPINION BY WERDEGAR, J. I CONCUR: MORENO, J.

OPINIONBY:
BROWN

OPINION:

The question presented by this case is whether an escrow holder owes a duty of care to a nonparty to the escrow based on an assignment to that nonparty by another nonparty to the escrow. We answer this question in the negative.

The complicated factual background of this case will be presented more fully below, but in brief, the question presented arises under the following circumstances: Dr. John Furnish, the maker of a promissory note secured by a deed of trust on real property in Corona Del Mar, refinanced his secured obligations by obtaining a new loan from a new lender, a portion of the proceeds of which was to pay the earlier note in full. Defendant Continental Lawyers Title Company (CLTC) provided escrow services for the refinance transaction and was instructed by the parties to the escrow to pay the note by issuing a check to Talbert Financial (Talbert). CLTC followed that instruction on closing of the refinance transaction. In this lawsuit, plaintiff Summit Financial Holdings, Ltd. (Summit) sued CLTC for negligence. Summit contended that in the refinance transaction CLTC should have paid the note by issuing a check to Summit rather than Talbert because CLTC knew Talbert had assigned its rights in the note and deed of trust to Summit. Neither the assignor, Talbert, nor the assignee, Summit, were parties to the escrow. Nevertheless, the trial court, relying on Kirby v. Palos Verdes Escrow Co. (1986) 183 Cal. App. 3d 57, 227 Cal. Rptr. 785 (Kirby), concluded that CLTC owed a duty of care to Summit, and that CLTC breached that duty because CLTC, with knowledge of the assignment from Talbert to Summit, paid Talbert rather than Summit. The trial court awarded judgment to Summit against CLTC for negligence, but the Court of Appeal reversed, holding that CLTC owed no duty of care to Summit.

We agree with the Court of Appeal and affirm its judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND*

A. The Loan

In August 1994 Furnish borrowed $ 425,000 from Talbert, and signed the note payable to Talbert. The note was secured by the deed of trust on the property. Both the note and the payment book given to Furnish required him to pay the monthly installments on the note to Talbert at Talbert's Orange, California, address. n1

At the same time the deed of trust was recorded, a document entitled "Assignment of Deed of Trust" was recorded that assigned the beneficial interest under the note and deed of trust from Talbert to Summit. However, neither Talbert nor Summit gave Furnish notice of the assignment, as[, according to Furnish, was] required by Civil Code section 2937. n2

B. The Refinance

In September 1995 Furnish obtained a new loan from Dundrel Securities (Dundrel) that was used in part to pay the note. Furnish and Dundrel employed Beverly Hills Escrow (BHE) to handle the refinancing transaction, and CLTC acted as an escrow holder in connection with issuing the title insurance for the new deed of trust securing the new note payable to Dundrel. [Neither Talbert nor Summit was a party to the BHE escrow or the CLTC escrow.]

CLTC prepared a preliminary title report noting (at item 6) that the property was encumbered by a deed of trust securing the Talbert note, and that an assignment of the note and deed of trust from Talbert to Summit had been recorded. BHE thereafter obtained a note payoff demand from Talbert specifying the outstanding balance to be paid to Talbert to fully pay the note. On September 8, 1995, BHE forwarded Talbert's payoff demand to CLTC and identified it as the "Demand for item 6 on the Preliminary Title Report."

On close of the refinancing transaction, CLTC paid Talbert from funds deposited with CLTC by Dundrel in accordance with the payoff demand and BHE's instructions. Summit did not receive these funds from Talbert.

C. The Legal Proceedings

In February 1997 Furnish filed for protection under chapter 11 of the United States Bankruptcy Code (11 U.S.C.), and in April 1997 the bankruptcy court entered an order for sale of the property free and clear of all liens. The order directed that the proceeds of the sale be used to pay the amounts owed the first trust deed holder, Dundrel, and amounts owed to another secured creditor, and that any purported liens on the property held by other parties, including Summit, would attach to the remaining proceeds of the sale.

In July 1997 Furnish moved in the bankruptcy court for an order disallowing Summit's lien claim on the remaining proceeds from the sale of the property. Furnish argued the amount he paid Talbert in 1995 in the refinance transaction fully extinguished Furnish's obligations under the note. He established that he never received notice of the assignment of the deed of trust[, and he contended that notice was] required by section 2937, subdivision (d), and [that] under section 2937, subdivision (f), a debtor's payment to the prior note holder before receiving notice of the assignment pro tanto extinguishes the underlying obligation. The payment to Talbert therefore[, Furnish argued,] fully extinguished the note. Summit opposed the motion, arguing that (1) the recorded assignment of the note and deed of trust was adequate to provide constructive notice of the transfer from Talbert to Summit, and (2) in any event Furnish received a notice that complied with section 2937, subdivision (d). The bankruptcy court concluded Furnish was not given the notice required by section 2937, subdivision (d) and the payment to Talbert extinguished the note under section 2937, subdivision (f). It therefore disallowed Summit's lien claim on the remaining proceeds for the sale of the property. [n3]

In this proceeding, Summit sought recovery from CLTC of the note payment CLTC made to Talbert, contending that CLTC was negligent by making the note payment to Talbert rather than to Summit. The trial court concluded Kirby was controlling and that CLTC owed a duty of care to Summit. The trial court further found that CLTC was negligent [and]

breached its duty of care to Summit, and [that] CLTC's negligence was a proximate cause of Summit's injury. Accordingly, the trial court entered judgment for damages in favor of Summit against CLTC. [n4]

[The Court of Appeal reversed on the ground that Summit, being a stranger to the escrow, was not owed a duty of care by CLTC.]

II. DISCUSSION

"An escrow involves the deposit of documents and/or money with a third party to be delivered on the occurrence of some condition." (3 Miller & Starr, Cal. Real Estate (3d ed. 1989) § 6:1, pp. 2-3 (rev. 9/00); see Fin. Code, § 17003, subd. (a).) An escrow holder is an agent and fiduciary of the parties to the escrow. (Amen v. Merced County Title Co. (1962) 58 Cal.2d 528, 534, 25 Cal. Rptr. 65, 375 P.2d 33 (Amen); Rianda v. San Benito Title Guar. Co. (1950) 35 Cal.2d 170, 173, 217 P.2d 25.) The agency created by the escrow is limited – limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow. (Vournas v. Fidelity Nat. Tit. Ins. Co. (1999) 73 Cal.App.4th 668, 674 (Vournas); Schaefer v. Manufacturers Bank (1980) 104 Cal. App. 3d 70, 77, 163 Cal. Rptr. 402 (Schaefer); Blackburn v. McCoy (1934) 1 Cal. App. 2d 648, 655, 37 P.2d 153.) If the escrow holder fails to carry out an instruction it has contracted to perform, the injured party has a cause of action for breach of contract. (Amen, at p. 532.)

In delimiting the scope of an escrow holder's fiduciary duties, then, we start from the principle that "an escrow holder must comply strictly with the instructions of the parties. [Citations.]" (Amen, supra, 58 Cal.2d at p. 531.) On the other hand, an escrow holder "has no general duty to police the affairs of its depositors"; rather, an escrow holder's obligations are "limited to faithful compliance with [the depositors'] instructions." (Claussen v. First American Title Guaranty Co. (1986) 186 Cal. App. 3d 429, 435-436, 230 Cal. Rptr. 749; see, e.g., Vournas, supra, 73 Cal.App.4th at p. 674; Romo v. Stewart Title of California (1995) 35 Cal.App.4th 1609, 1618, fn. 9; Schaefer, supra, 104 Cal. App. 3d at pp. 77-78; Axley v. Transamerica Title Ins. Co. (1978) 88 Cal. App. 3d

1, 9, 151 Cal. Rptr. 570.) Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions. (Lee v. Title Ins. & Trust Co. (1968) 264 Cal. App. 2d 160, 162, 70 Cal. Rptr. 378; 3 Miller & Starr, Cal. Real Estate, supra, § 6:26, p. 68.) Here, even though the escrow holder, CLTC, was aware of the assignment from Talbert to Summit, there is no evidence CLTC was aware of any collusion or fraud in the fund disbursement that would have adversely affected any party to the escrow.

However, because CLTC knew Talbert had assigned its rights in the note and deed of trust to Summit, Summit contends CLTC breached both a fiduciary duty and a tort duty to Summit by paying Talbert. We conclude neither contention has merit.

A. The Asserted Fiduciary Duty: Kirby

In contending that the escrow holder here, CLTC, owed a duty of care to Summit, even though neither Talbert nor Summit were parties to the escrow, Summit relies upon Kirby, supra, 183 Cal. App. 3d 57. In Kirby, the Pierces opened an escrow with Palos Verdes Escrow Company, Inc. (Palos Verdes) for the purchase of certain real property. While awaiting permanent financing from the Small Business Administration (SBA), the Pierces took out a short-term loan from Universal Financial (Universal), which loan was secured by a second deed of trust on the property. Universal then assigned the note and the deed of trust to the Kirbys, and the assignment was recorded. After funds from the SBA were deposited into escrow, Universal made a demand on Palos Verdes for payment of the Pierces' note, and the Pierces orally authorized payment. Because one of its officers had reviewed the title insurance policy on the property before forwarding it to the Pierces, Palos Verdes had constructive notice of Universal's assignment to the Kirbys. Nevertheless, Palos Verdes made the payment to Universal. When the Kirbys demanded payment from Universal and Universal failed to pay them, the Kirbys filed suit against Palos Verdes on the theory it performed its escrow duties negligently by paying Universal rather than the Kirbys. The Kirbys prevailed in the trial court, and the Court of Appeal affirmed. (Kirby, at pp. 60-61.)

Kirby began its analysis by reviewing the familiar principles recited above. (Kirby, supra, 183 Cal. App. 3d at pp. 64-65.) However, after acknowledging that the agency created by an escrow is limited to the obligation to carry out the instructions of the parties to the escrow, and that an escrow holder is liable to the parties insofar as it fails to carry out the instructions it has contracted to perform, Kirby held that Palos Verdes was liable to the Kirbys, who were strangers to the escrow, precisely because it did carry out the instructions of a party–the Pierces. The rationale Kirby gave for this anomalous conclusion was that "receipt of notice of the assignment was equivalent to the receipt of new escrow instructions regarding the party to be paid. (Builders' Control Service of No. Cal., Inc. v. North American Title Guar. Co. (1962) 205 Cal. App. 2d 68, 74, 22 Cal. Rptr. 712 . . . .) Such 'new' instructions conflicted with the Pierces' verbal instructions to pay Universal. This conflict should have alerted defendant to a potential problem in paying Universal rather than the Kirbys, and vice versa. As the escrow holder faced with conflicting instructions, Palos Verdes had the duty to delay payment of escrow funds until such time as the proper payee was identified. [Citation.]" (Kirby, at pp. 65-66.)

As the Court of Appeal in the present case observed, Kirby appears to be the only California case that holds an escrow holder can be liable to strangers to the escrow for injuries allegedly caused by the escrow holder following its principals' instructions. We agree with the Court of Appeal that Kirby's analysis for its novel legal conclusion is not convincing. "Kirby's holding rested on its reading of Builders' Control Service that (1) knowledge of an escrow holder that a nonparty distributee of funds from the escrow has made an assignment of the right to receive those funds is deemed an amendment to the escrow instructions by the parties to the escrow, and (2) an escrow holder who follows the parties' instructions rather than the 'deemed amended' instructions is exposed to liability even though its principals suffer no injury from the fact the escrow holder followed its principals' instructions. [P] Kirby's holding is flawed because Builders' Control Service does not stand for either legal proposition."

In Builders' Control Service, a lender agreed to fund an owner-builder's construction of homes, and to ensure that the loan funds would actually be used to pay the construction costs, the lender deposited the funds with the plaintiff fund control agent. The parties to the loan also agreed that the owner-builder would assign the proceeds from the sale of the newly constructed homes to the fund control agent as an additional source of funds to pay the construction costs. The defendant title company acted as an escrow holder for the proceeds of the home sales, and, because it had received a copy of the assignment and had recorded it, the title company knew that the owner-builder had assigned the proceeds of the sales to the fund control agent. Nevertheless, the title company assertedly made deductions from the sales proceeds in violation of the terms of the assignment. (Builders' Control Service of No. Cal., Inc. v. North American Title Guar. Co, supra, 205 Cal. App. 2d at pp. 70-72 (Builders' Control Service).) In Builders' Control Service, then, the question was whether the defendant title company, acting in its capacity as an escrow holder and knowing that its principal had assigned the sales proceeds held by it, was liable to the plaintiff fund control agent for violating the terms of the assignment.

As the Court of Appeal in the present case correctly observed: "Although the Builders' Control Service court concluded the escrow holder was obligated to disburse the funds to the owner-builder's assignee, the principles it applied have no application to whether an escrow holder owes duties to a nonparty based on an assignment made by [one] stranger to the escrow to [another] stranger to the escrow. The Builders' Control Service court first noted that when a home sale escrow closed, the escrow holder held the sales proceeds as agent for the owner-builder principal. The Builders' Control Service court then cited section 2344 for the rule that, when a principal has assigned funds to a third party, an agent for that principal who comes into possession of those funds must surrender them to the third party. (205 Cal. App. 2d at p. 73.) Thus, Builders' Control Service stands for the proposition only that an agent's obligation to disburse proceeds held by the agent for its principal is coextensive

with the principal's obligation to disburse those proceeds to the assignee. [Fn. omitted.]"

We agree with the Court of Appeal here that "Kirby misread Builders' Control Service. Builders' Control Service holds only that an agent's knowledge of an assignment by its principal obligates the agent to honor the principal's assignment [fn. omitted]; Kirby transformed that obligation, which is founded in the law of agency, into a duty owed to honor contracts made by creditors of the principal even though the escrow holder had no agency relationship with the creditor." The Builders' Control Service court did say that "receipt of notice [of an assignment] is tantamount to new instructions." (Builders' Control Service, supra, 205 Cal. App. 2d at p. 74.) However, under the facts of that case, the statement meant no more than that a party to an escrow may issue new instructions to the escrow holder in the form of an assignment. As the Court of Appeal here observed: "Kirby's citation to Builders' Control Service as holding that receipt of notice of the assignment was equivalent to the receipt of new escrow instructions regarding the party to be paid demonstrates Kirby's misreading of Builders' Control Service. In the context of Builders' Control Service, the agent's receipt of notice of the assignment could be deemed the equivalent of a new instruction regarding the party to be paid because the assignment was made by the owner-builder, a party to the escrow entitled to give instructions to the escrow holder. However, Kirby transmuted that agency concept into a holding that transactions by strangers to an escrow can supersede and amend the instructions given by the parties to the escrow. Nothing in Builders' Control Service supports that remarkable conclusion." n5

For the reasons stated, Kirby v. Palos Verdes Escrow Co., supra, 183 Cal. App. 3d 57, is disapproved insofar as it is inconsistent with the views expressed herein.

B. The Asserted Tort Duty: Section 1714, Subdivision (a)

In the alternative, relying upon section 1714, subdivision (a), n6 Summit argues the judgment against CLTC was proper because all persons are liable for injuries caused by their

negligent conduct. However, the threshold question in an action for negligence is whether the defendant owed the plaintiff a duty to use care (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 732, p. 60), and the "recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law" (Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 58, 960 P.2d 513).

In Biakanja v. Irving (1958) 49 Cal.2d 647, 650, 320 P.2d 16, we stated: "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. [Citations.]"

Applying the six-factor Biakanja test to the facts of this case, the Court of Appeal concluded there was no reason to depart from "the general rule that an escrow holder incurs no liability for failing to do something not required by the terms of the escrow or for a loss caused by following the escrow instructions. (Axley v. Transamerica Title Ins. Co., supra, 88 Cal. App. 3d at p. 9)." We find the analysis of the Court of Appeal persuasive. "First, the transaction CLTC undertook was not intended to affect or benefit Summit. CLTC was engaged by Dundrel and Furnish to assist them in closing a loan transaction between Dundrel and Furnish, and any impact that transaction may have had on Summit was collateral to the primary purpose of the escrow. Second, although the certainty of injury element is satisfied because the evidence supports the conclusion Summit did not receive the funds paid to Talbert, the foreseeability of harm element does not support a duty because there is no suggestion CLTC could have foreseen that Talbert would not disburse the funds to Summit. [n7]" With regard to the moral blame factor, compliance by CLTC with its fiduciary duty to follow the

instructions of the parties to the escrow was not blameworthy and is, instead, a policy consideration that militates against concluding the company had a tort duty in this case. Finally, there is not a sufficiently close connection between the payment of Talbert and the injury suffered by Summit to warrant imposition of a duty of care. Although the payment to Talbert was found by the bankruptcy court to have extinguished Furnish's obligation under the note, Summit's injury was caused by Talbert's breach of its contractual obligation to Summit.

CONCLUSION

We decline to adopt a rule that would, by subjecting an escrow holder to conflicting obligations, undermine a valuable business procedure, and we therefore affirm the judgment of the Court of Appeal.

BROWN, J.

Footnotes

* We adopt the Court of Appeal's statement of the factual and procedural background as part I of our opinion. No party petitioned for rehearing to suggest that the Court of Appeal omitted or misstated any material fact. (Cal. Rules of Court, rule 29(b)(2).) Brackets enclosing material (other than parallel citations) denote insertions or additions by this court.

n1 Under the terms of the note, the first six monthly installments were impounded. Furnish paid three other monthly installments to Talbert in June, July and August 1995. Other than the impounded amounts and these three payments, Furnish made no payments on the note.

n2 All statutory references are to the Civil Code unless otherwise specified.

n3 [Both the bankruptcy court and the Court of Appeal assumed that section 2937 requires that a borrower be given notice of the assignment of the debt. However, by its terms the section requires only that a borrower be given notice of transfer of servicing of a debt on one to four residential units. Commentary on the Court of Appeal's opinion raises the

question whether section 2937 does apply to assignment, as well as transfer of servicing, of a debt. (See Bernhardt & Whitman, Escrow (Cont.Ed.Bar 2001) 24 Real Prop. L.Rptr. 160.) That is a question we need not and do not reach here. In this case, the borrower, Furnish, was found free of liability by the bankruptcy court and the parties no longer dispute that issue.]

n4 The trial court reduced the damage award sought by Summit because it concluded Summit was contributorily negligent.

n5 Builders' Control Service relies on two cases – Baumgarten v. California Pac. T. & T. Co. (1932) 127 Cal.App. 649, 16 P.2d 332 and Roberts v. Carter & Potruch (1956) 140 Cal. App. 2d 370, 295 P.2d 515 – for the proposition that once funds in escrow have been assigned, and the escrow holder notified of the assignment, the escrow holder must observe the assignment. (Builders' Control Service, supra, 205 Cal. App. 2d at pp. 73-74.) Like Builders' Control Service, both Baumgarten and Roberts involve assignments by parties to escrows. (Baumgarten, at pp. 653-656; Roberts, at pp. 371-372.)

n6 Section 1714, subdivision (a) provides: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief."

n7 "In arguing for imposition of a duty, Summit emphasizes that CLTC knew Summit was the assignee of the note and deed of trust and knew or should have foreseen that payment to Talbert would injure Summit. However, foreseeability of financial injury to third persons is not alone sufficient to impose liability for negligent conduct. (Quelimane Co. v. Stewart Title Guaranty Co., supra, 19 Cal.4th 26, 57-58.)"

WE CONCUR:

GEORGE, C.J.

KENNARD, J.

BAXTER, J.

WERDEGAR, J.

CHIN, J.

MORENO, J.

CONCURBY:
WERDEGAR

CONCUR:

CONCURRING OPINION BY WERDEGAR, J.

I join the majority in concluding that defendant Continental Lawyers Title Company (CLTC) owed no duty, as a fiduciary or under the law of negligence, to make the loan payoff to plaintiff Summit Financial Holdings, Ltd. (Summit), rather than to the original lender, Talbert Financial (Talbert). I have signed the majority opinion because I understand its holding as limited to this and similar fact situations and, in particular, as not deciding whether an escrow holder might breach its fiduciary duty to a party to the escrow by paying off, pursuant to instructions, an original lender who had assigned and transferred the note and deed of trust to another.

Under Civil Code section 2935, paying the outstanding amount of a loan secured by a deed of trust to the original lender does not extinguish the debt if an assignment of the loan has been recorded and the original lender no longer holds the promissory note. (Rodgers v. Peckham (1898) 120 Cal. 238, 242, 52 P. 483.) As the majority observes, the Legislature may, in Civil Code section 2937, have intended to change this rule as to small residential properties and require personal notice to the borrower, though that statute speaks only of transfers of servicing of indebtedness, not of

assignments. (Maj. opn., ante, at p. 5, fn. 3; see Bernhardt & Whitman, Escrow (Cont.Ed.Bar 2001) 24 Real Prop. L.Rptr. 160.) To the extent the rule of Civil Code section 2935 stands unmodified, however, a borrower could remain indebted to an assignee holding the note even after paying off the original lender in full, and thus be liable for double payment or face foreclosure on the security. Where the misdirected payment is made by and through an escrow agent, in the face of recorded notice of the assignment, the escrow agent might well be held to have breached its duty to the borrower. That such a misdirected payoff were made pursuant to the escrow instructions–typically drafted by the escrow agent itself or by the new lender, rather than by the borrower–would not necessarily excuse or negate the breach.

In short, a borrower subjected to double payment of a loan because the escrow agent paid the wrong party might be able to recover from the escrow agent in the amount of the payment or other damages, even if the escrow agent was only following its instructions. In the present case, however, we need not face this question, as here a federal bankruptcy court and the appellate court below held the payment to Talbert extinguished the borrower's debt, and the parties no longer dispute that point.

Also properly left unaddressed in the majority opinion is Summit's perfunctory claim that CLTC is liable for violating Civil Code section 2941, which governs the reconveyance of a deed of trust when the obligation it secures has been satisfied. Summit neither explains in what respect CLTC violated Civil Code section 2941 nor cites record evidence showing a violation. But Civil Code section 2941 does provide for a title company's liability under some circumstances (see id., subd. (b)(6)), and the majority opinion, as I read it, does not preclude such liability in a proper case.

I concur in the majority opinion, which correctly resolves the narrow question presented by the parties to this case.

WERDEGAR, J.

I CONCUR:

MORENO, J.

D036868

COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT,
DIVISION ONE

SUMMIT FINANCIAL HOLDINGS, LTD.,
Plaintiff and Respondent,

v.

CONTINENTAL LAWYERS TITLE COMPANY,
Defendant and Appellant.

March 27, 2001, Filed

COUNSEL:
Wolf, Rifkin & Shapiro and Marc Eliot Rohatiner for Defendant and Appellant.

Doumani & Grandon, Robert M. Grandon; Callahan & Blaine and Jim P. Mahacek for Plaintiff and Respondent.

JUDGES:
McDONALD, J. WE CONCUR: NARES, Acting P.J., O'ROURKE, J.

OPINIONBY:
McDONALD

OPINION:

In 1994 Dr. Furnish, the maker of a promissory note secured by a deed of trust on real property in Corona Del Mar (referred to as the note, the deed of trust and the property, respectively), refinanced his secured obligations by obtaining a new loan from a new lender, a portion of the proceeds of which was to pay the note in full. Appellant Continental Lawyers Title Company (CLTC) provided escrow services for the refinance transaction and was instructed by the parties to

the escrow to pay the note by issuing a check to Talbert Financial (Talbert). CLTC followed that instruction on closing of the refinance transaction.

In this lawsuit, respondent Summit Financial Holdings, Ltd. (Summit) sued CLTC for negligence. Summit alleged that in the refinance transaction CLTC should have paid the note by issuing a check to Summit rather than Talbert because CLTC knew Talbert had assigned its rights in the note and deed of trust to Summit. The trial court, relying on Kirby v. Palos Verdes Escrow Company, Inc. (1986) 183 Cal. App. 3d 57, 227 Cal. Rptr. 785 (Kirby), concluded CLTC as escrow holder owed a duty of care to third parties, including Summit, who were not parties to the escrow; and breached that duty because CLTC, with knowledge of the assignment from Talbert to Summit, paid Talbert rather than Summit. The trial court awarded judgment to Summit against CLTC for negligence, and this appeal by CLTC followed.

Although CLTC raises numerous claims on appeal, the dispositive issue is whether Kirby correctly held that a stranger to the escrow is owed a duty of care by an escrow holder. We conclude an escrow holder owes a duty of care only to the parties to and participants in the escrow, and Kirby incorrectly held an escrow holder liable to a stranger to the escrow under a negligence theory. Because CLTC owed no duty of care to Summit, we reverse the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. The Loan

In August 1994 Furnish borrowed $ 425,000 from Talbert, and signed the note payable to Talbert. The note was secured by the deed of trust on the property. Both the note and the payment book given to Furnish required him to pay the monthly installments on the note to Talbert at Talbert's Orange, California address. n1

At the same time that the deed of trust was recorded, a document entitled "Assignment of Deed of Trust" was

recorded that assigned the beneficial interest under the note and deed of trust from Talbert to Summit. However, neither Talbert nor Summit gave Furnish notice of the assignment, as required by Civil Code 2937. n2

B. The Refinance

In September 1995 Furnish obtained a new loan from Dundrel Securities (Dundrel) that was used in part to pay the note. Furnish and Dundrel employed Beverly Hills Escrow (BHE) to handle the refinancing transaction, and CLTC acted as an escrow holder in connection with issuing the title insurance for the new deed of trust securing the new note payable to Dundrel. Summit was not a party to the BHE escrow or the CLTC escrow.

CLTC prepared a preliminary title report noting (at item 6) that the property was encumbered by a deed of trust securing the Talbert note, and that an assignment of the note and deed of trust from Talbert to Summit had been recorded. BHE thereafter obtained a note payoff demand from Talbert specifying the outstanding balance to be paid to Talbert to fully pay the note. On September 8, 1995, BHE forwarded Talbert's payoff demand to CLTC and identified it as the "Demand for item 6 on the Preliminary Title Report."

On close of the refinancing transaction, CLTC paid Talbert from funds deposited with CLTC by Dundrel in accordance with the payoff demand and BHE's instructions. Summit did not receive these funds from Talbert.

C. The Legal Proceedings

In February 1997 Furnish filed for protection under Chapter 11 of the United States Bankruptcy Code, and in April 1997 the bankruptcy court entered an order for sale of the property free and clear of all liens. The order directed that the proceeds of the sale be used to pay the amounts owed the first trust deed holder Dundrel and amounts owed to another secured creditor, and that any purported liens on the property held by other parties, including Summit, would attach to the remaining proceeds of the sale.

In July 1997 Furnish moved in the bankruptcy court for an order disallowing Summit's lien claim on the remaining proceeds from the sale of the property. Furnish argued the amount he paid Talbert in 1995 in the refinance transaction fully extinguished Furnish's obligations under the note. He established that he never received notice of the assignment of the deed of trust as required by section 2937, subdivision (d), and under section 2937, subdivision (f), a debtor's payment to the prior note holder before receiving notice of the assignment pro tanto extinguishes the underlying obligation. The payment to Talbert therefore fully extinguished the note. Summit opposed the motion, arguing that (1) the recorded assignment of the note and deed of trust was adequate to provide constructive notice of the transfer from Talbert to Summit, and (2) in any event Furnish received a notice that complied with section 2937, subdivision (d). The bankruptcy court concluded Furnish was not given the notice required by section 2937, subdivision (d) and the payment to Talbert extinguished the note under section 2937, subdivision (f). It therefore disallowed Summit's lien claim on the remaining proceeds for the sale of the property.

In this proceeding, Summit sought recovery from CLTC of the note payment CLTC made to Talbert, contending that CLTC was negligent by making the note payment to Talbert rather than to Summit. The trial court concluded Kirby was controlling and that CLTC owed a duty of care to Summit. The trial court further found that CLTC was negligent, breached its duty of care to Summit, and CLTC's negligence was a proximate cause of Summit's injury. Accordingly, the trial court entered judgment for damages in favor of Summit against CLTC. n3

II

ANALYSIS

A. Standard of Review

Summit argues that whether CLTC owed a duty of care to Summit involves the resolution of disputed facts, and we must therefore defer to the trial court's ruling if it is

supported by substantial evidence. However, Summit cites no authority supporting that argument, and the courts have concluded that whether a duty of care exists is a question of law for the court; our review of the trial court's ruling is therefore de novo. (Koepke v. Loo (1993) 18 Cal. App. 4th 1444, 1450-1451; Delgado v. American Multi-Cinema, Inc. (1999) 72 Cal. App. 4th 1403, 1406-1407.)

B. Kirby Erred by Imposing on Escrow Holders a Duty of Care to Strangers to the Escrow

An escrow holder is the dual agent of, and owes duties to, the parties to the escrow. The primary duty owed by an escrow holder is to strictly and faithfully perform the instructions given to it by the parties to the escrow. (Vournas v. Fidelity Nat. Tit. Ins. Co. (1999) 73 Cal. App. 4th 668, 674.) An escrow holder owes ancillary duties to the parties to the escrow, including a duty "to communicate to his principal knowledge acquired in the course of his agency with respect to material facts [that] might affect the principal's decision as to a pending transaction, particularly where, as here, he knows that the principal is looking to him for protection as to those very facts of which he has knowledge." (Contini v. Western Title Ins. Co. (1974) 40 Cal. App. 3d 536, 547, 115 Cal. Rptr. 257.) If the escrow holder breaches this obligation of disclosure, or does not exercise reasonable skill and diligence in carrying out the escrow instructions, the escrow holder can be liable to its principal for any resulting injury. (Colonial Savings & L. Assn. v. Redwood Empire Title Co. (1965) 236 Cal. App. 2d 186, 190-191, 46 Cal. Rptr. 16.) However, an escrow holder ordinarily incurs no liability for failing to do something not required by the escrow instructions or for a loss caused by following the escrow instructions. (Axley v. Transamerica Title Ins. Co. (1978) 88 Cal. App. 3d 1, 9, 151 Cal. Rptr. 570; accord, Romo v. Stewart Title of California (1995) 35 Cal. App. 4th 1609, 1618 fn. 9 [obligation of escrow holder limited to faithful compliance with instructions from the principal].)

Kirby appears to be the only case that holds an escrow holder can be liable to strangers to the escrow for injuries

allegedly caused by the escrow holder following its principals' instructions. n4 We conclude that the case law on which Kirby relied for its legal analysis does not support the conclusion it reached, and we disagree with Kirby's holding that an escrow holder who follows its principals' instructions can be liable to strangers to the escrow under a negligence theory. n5

In Kirby, the plaintiffs loaned funds to Universal and received an unsecured promissory note from Universal. Universal loaned funds to the Pierces and received a note secured by a deed of trust; Universal assigned the Pierces' note and deed of trust to plaintiffs as security for Universal's note to plaintiffs and the assignment was recorded. The Pierces opened an escrow with defendant escrow holder to refinance the note they had given to Universal. Universal submitted a pay-off demand to the escrow holder and the Pierces authorized the escrow holder to pay Universal's demand. The escrow holder paid Universal although it was aware Universal had assigned the Pierces' note to the plaintiffs. Plaintiffs later sued the escrow holder, alleging that because it was aware of the recorded assignment of the Pierces' note from Universal to plaintiffs it performed its escrow duties negligently by paying Universal rather than plaintiffs. (Kirby, supra, 183 Cal. App. 3d at pp. 60-61.) Kirby held the defendant escrow holder liable to the plaintiffs on a negligence theory.

Kirby's analysis began with a review of established principles governing an escrow holder's role and duties. n6 Kirby recognized an escrow holder is a limited agent of the parties to the escrow, representing these principals only insofar as it carries out the escrow instructions, and that a breach of an escrow holder's duty to use reasonable skill and diligence in implementing the escrow instructions exposes it to liability for any resulting injury suffered by its principals. (Id. at pp. 64-65.) However, after citing numerous cases that describe the duties owed by an escrow holder to its principal, Kirby relied on Builders' Control Service of No. Cal., Inc. v. North American Title Guar. Co. (1962) 205 Cal. App. 2d 68, 22 Cal. Rptr. 712 (Builders' Control Service) to hold that an escrow holder owes the same obligations to nonparties to the

escrow. The Kirby court noted that the escrow holder had constructive knowledge of the assignment of the Pierces' note from one nonparty (Universal) to another nonparty (the plaintiffs), and then stated:

"Receipt of notice of the assignment was equivalent to the receipt of new escrow instructions regarding the party to be paid. [Citing Builders' Control Service.] Such 'new' instructions conflicted with the Pierces' verbal instructions to pay Universal. This conflict should have alerted defendant to a potential problem in paying Universal rather than the [plaintiffs], and vice versa. As the escrow holder faced with conflicting instructions, [defendant] had the duty to delay payment of escrow funds until such time as the proper payee was identified. [Citation.]

"Notwithstanding the fact that payment to Universal would have been proper under the provisions of the [Commercial Code], that act represented a violation of defendant's overriding duty as an escrow agent. . . . [Defendant] may be held accountable for the loss it occasioned by negligently paying escrow funds to the wrong party." (Kirby, supra, 183 Cal. App. 3d at pp. 65-66.)

Kirby's holding rested on its reading of Builders' Control Service that (1) knowledge of an escrow holder that a nonparty distributee of funds from the escrow has made an assignment of the right to receive those funds is deemed an amendment to the escrow instructions by the parties to the escrow, and (2) an escrow holder who follows the parties' instructions rather than the "deemed amended" instructions is exposed to liability even though its principals suffer no injury from the fact the escrow holder followed its principals' instructions.

Kirby's holding is flawed because Builders' Control Service does not stand for either legal proposition. In Builders' Control Service, a lender agreed to fund the owner-builder's construction of homes and deposited the loan proceeds with the plaintiff, a fund control agent; plaintiff was to use those funds to pay the construction costs. The parties

also agreed that the owner-builder would assign the proceeds from the sale of the newly constructed homes to the plaintiff fund control agent as an additional source to pay the construction costs. The defendant acted as escrow holder for the proceeds of the home sales knowing the owner builder had assigned the sales proceeds to the plaintiff fund control agent. (Builders' Control Service, supra, 205 Cal. App. 2d at pp. 70-71.) The issue in Builders' Control Service was whether the escrow holder, knowing its principal had assigned the sales proceeds held by it, was obligated to disburse those proceeds to the owner's assignee, the fund control agent.

Although the Builders' Control Service court concluded the escrow holder was obligated to disburse the funds to the owner-builder's assignee, the principles it applied have no application to whether an escrow holder owes duties to a nonparty based on an assignment made by a stranger to the escrow to a stranger to the escrow. The Builders' Control Service court first noted that when a home sale escrow closed, the escrow holder held the sales proceeds as agent for the owner-builder principal. The Builders' Control Service court then cited section 2344 for the rule that, when a principal has assigned funds to a third party, an agent for that principal who comes into possession of those funds must surrender them to the third party. (Id. at p. 73.) Thus, Builders' Control Service stands for the proposition only that an agent's obligation to disburse proceeds held by the agent for its principal is coextensive with the principal's obligation to disburse those proceeds to the assignee. n7

In our view, Kirby misread Builders' Control Service. Builders' Control Service holds only that an agent's knowledge of an assignment by its principal [**16] obligates the agent to honor the principal's assignment; n8 Kirby transformed that obligation, which is founded in the law of agency, into a duty owed to honor contracts made by creditors of the principal even though the escrow holder had no agency relationship with the creditor. Moreover, the agent's obligation to the third party under Builders' Control Service is coextensive with the principal's obligation to the third party; Kirby transmuted the agent's obligation into one

that is independent of the principal's obligation because it held the agent liable on the note even though the principal was exonerated from further liability on the note by the payment to Universal.

An escrow holder is an agent of the parties to the escrow and is responsible for following the escrow instructions of its principals. Kirby is the only case of which we are aware that holds an escrow holder who follows its principal's instructions, and whose action caused no injury to the principals, can nevertheless be liable to strangers to the escrow for negligence. Because Kirby's holding was based on a misconstruction of existing law, we are convinced it was erroneously decided and should not be perpetuated. We therefore conclude that the trial court's judgment, to the extent it rests on Kirby, was erroneous and must be reversed.

C. An Escrow Holder Owes No General Duty of Care to a Nonparty Stranger to the Escrow

Summit alternatively argues the judgment was proper because all persons are liable for injuries caused by their negligent conduct. (§ 1714, subd. (a).) However, whether a duty of care exists is the foundational legal issue, and "recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law." (Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal. 4th 26, 57-58, 960 P.2d 513 [declining to find duty].) In Biakanja v. Irving (1958) 49 Cal. 2d 647, 320 P.2d 16, the court stated at page 650 that: "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." It is the general rule that an escrow holder incurs no liability for failing to do something not required by the terms

of the escrow or for a loss caused by following the escrow instructions. (Axley v. Transamerica Title Ins. Co., supra, 88 Cal. App. 3d at p. 9.) Application of the Biakanja factors convince us we should not depart from this general rule.

First, the transaction CLTC undertook was not intended to affect or benefit Summit. CLTC was engaged by Dundrel and Furnish to assist them in closing a loan transaction between Dundrel and Furnish, and any impact that transaction may have had on Summit was collateral to the primary purpose of the escrow. Second, although the certainty of injury element is satisfied because the evidence supports the conclusion Summit did not receive the funds paid to Talbert, the foreseeability of harm element does not support a duty because there is no suggestion CLTC could have foreseen that Talbert would default on its obligation to disburse the funds to Summit as Talbert had agreed to do under the assignment. n9

The next two factors also militate against imposing a duty on CLTC. We do not assign moral blame to the act of paying Talbert rather than Summit where that act fulfilled CLTC's duty as an escrow holder to perform the instructions given to it by the parties to the escrow (Vournas v. Fidelity Nat. Tit. Ins. Co., supra, 73 Cal. App. 4th at p. 674), and was an act authorized by statute (§ 2937, subds. (d), (f)). Furthermore, there is not a sufficiently close connection between the payment of Talbert and the injury suffered by Summit to warrant imposition of a duty of care. Although the payment to Talbert extinguished Furnish's obligation under the note, Summit's injury was caused by its own noncompliance with its statutory obligations (§ 2937, subd. (d)) and because Talbert breached its contractual obligation to Summit.

Finally, we decline to impose the duty advocated by Summit for reasons analogous to those articulated in Sanchez v. Lindsey Morden Claims Services, Inc. (1999) 72 Cal. App. 4th 249. In Sanchez, an independent insurance adjuster was hired by the insurer to assist it in discharging the insurer's obligation to pay its insured for a loss covered by the policy. The insured sued the claims adjuster, alleging the adjuster negligently handled the claim and caused economic injury to

the insured. The Sanchez court, applying the Biakanja v. Irving factors as refined by Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 834 P.2d 745, explained at pages 253-255 the reasons it would not impose on the adjuster a duty of care to the insured. The Sanchez court noted the adjuster is subject to the control of its principals, and it is the principal that ultimately decides whether to pay the insured, and thus any injury to the insured is primarily attributable to the principal's actions. Moreover, the insurer may by contract limit its exposure to the insured but an adjuster does not have that contractual ability; imposing a duty to the insured could create the anomaly that the adjuster is exposed to greater liability than the principal. Sanchez also noted that an adjuster owes a duty of loyalty to its principal; imposing a duty toward the insured would be poor policy because the conflicting obligations would interfere with the adjuster's faithful performance of its duty toward the principal. (Accord, Gay v. Broder (1980) 109 Cal. App. 3d 66, 74-75, 167 Cal. Rptr. 123.) Finally, the goal of deterring negligent conduct would not be significantly advanced by imposing a duty because adjusters are already deterred by the fact that the principal who hired them can seek indemnity from the adjuster for negligent conduct.

The Sanchez court buttressed its conclusion not to impose on the adjuster a duty of care to the insured with the observation that:

"Our conclusion is also consistent with the general law of agency. An adjuster is an agent hired by a principal, the insurer, to investigate a claim. Agents are not liable to third parties for economic loss: 'An agent's mere failure to perform a duty owed to his principal may render him liable to third persons who rely on his undertaking where there is physical damage to person or property. [Citation.] But where the effect is merely to cause economic loss, the law does not yet recognize liability to a third person, except where a duty is created by statute.' [Citation.]" (Sanchez v. Lindsey Morden Claims Services, Inc., supra, 72 Cal. App. 4th at p. 255, italics omitted.)

Similar considerations support our conclusion in this case. First, an escrow holder is subject to the control of its principals, and it is the principal that issues the instructions to be followed by the escrow holder. Second, imposing a duty here would have the anomalous effect that the original debtor is exonerated from liability on his debt by his agent's payment to Talbert but the agent making that payment for its principal becomes liable on that debt. Third, imposing a duty would be poor policy because it would subject the escrow holder to conflicting obligations and interfere with its primary duty to follow its principal's instructions. Finally, the goal of deterring negligent conduct would not be significantly advanced by imposing a duty because escrow holders are already deterred by the fact that the principal who hired them can seek indemnity from the escrow holder to the extent the principal was injured by the escrow holder's negligence.

C. Conclusion

We hold that CLTC did not owe a duty of care to Summit under Biakanja v. Irving, supra, 49 Cal. 2d 647. We also conclude Kirby was incorrectly decided and should not be followed. Accordingly, there is no basis for permitting Summit to recover from CLTC.

DISPOSITION

The judgment is reversed. Appellant shall recover costs on appeal.

McDONALD, J.

WE CONCUR:

NARES, Acting P.J.

O'ROURKE, J.

Footnotes

n1 Under the terms of the note, the first six monthly installments were impounded. Furnish paid three other monthly installments to Talbert in June, July and August 1995. Other than the impounded amounts and these three payments, Furnish made no payments on the note.

n2 All statutory references are to the Civil Code unless otherwise specified.

n3 The trial court reduced the damage award sought by Summit because it concluded Summit was contributorily negligent.

n4 Kirby appears to be the first California case to permit a stranger to the escrow to recover against the escrow holder for negligence, and this aspect of Kirby has not been followed by any reported California case.

n5 The cases in which escrow holders have been held liable to third parties did not involve third parties who were strangers to the escrow. For example, in Warington Lbr. Co. v. Fullerton Mtge. & Escrow Co. (1963) 222 Cal. App. 2d 706, 35 Cal. Rptr. 423, the escrow holder entered into an agreement with the third party to pay funds to the third party upon receiving the money, and the escrow holder's liability rested on the court's conclusion that the escrow holder "was no longer merely a disbursing agent but was a principal under the agreement." (Id. at p. 710.) Similarly, in Feinberg v. Intrastate Escrow Corp. (1963) 216 Cal. App. 2d 80, 30 Cal. Rptr. 781, the plaintiff-creditor agreed to withhold levying on property in return for the agreement by both the property-owner debtor and the escrow holder to pay the plaintiff on funding of a new loan on the property. The court held the escrow holder was estopped to deny liability to the plaintiff because the escrow holder actively participated in inducing

the plaintiff to detrimentally rely on the promise of payment. (Id. at pp. 82-85.)

n6 In the earlier portion of its opinion, Kirby recognized the Pierces were entitled to pay Universal, even though Universal had assigned the Pierces' promissory note to the plaintiffs, because an obligor is entitled to pay the original obligee until the obligor receives notification of the assignment, and merely recording the assignment does not suffice as notification that required payment be made to the assignee. (Kirby, supra, 183 Cal. App. 3d at pp. 62-63.) That aspect of Kirby is consistent with current law (see § 2937, subds. (d), (f)), and validates the bankruptcy court's ruling that the payment to Talbert exonerated Furnish's liability under the note.

n7 The core holding of Builders' Control Service is confirmed by an understanding of the purpose and scope of the duties created by section 2344. As explained by the court in Garrison v. Edward Brown & Sons (1944) 25 Cal. 2d 473, 482-483, 154 P.2d 377, the obligation owed by an agent under section 2344 as to funds held by the agent for its principal is limited to what the claimant would otherwise be entitled to recover from the agent's principal; the "purpose of section 2344 . . . is to avoid circuity of action rather than to enlarge the scope of the recovery to which the claimant is entitled against the principal."

n8 Kirby's citation to Builders' Control Service as holding that receipt of notice of the assignment was equivalent to the receipt of new escrow instructions regarding the party to be paid demonstrates Kirby's misreading of Builders' Control Service. In the context of Builders' Control Service, the agent's receipt of notice of the assignment could be deemed the equivalent of a new instruction regarding the party to be paid because the assignment was made by the owner-builder, a party to the escrow entitled to give instructions to the escrow holder. However, Kirby transmuted that agency concept into a holding that transactions by strangers to an escrow can supersede and amend the instructions given by the parties to the escrow. Nothing in Builders' Control Service supports that remarkable conclusion.

n9 In arguing for imposition of a duty, Summit emphasizes that CLTC knew Summit was the assignee of the note and deed of trust and knew or should have foreseen that payment to Talbert would injure Summit. However, foreseeability of financial injury to third persons is not alone sufficient to impose liability for negligent conduct. (Quelimane Co. v. Stewart Title Guaranty Co., supra, 19 Cal. 4th 26, 57-58.)

CASE NO. 767157

SUPERIOR COURT OF THE STATE OF CALIFRONIA
COUNTY OF ORANGE

SUMMIT FINANCIAL HOLDINGS,LTD.,
Plaintiff,

v.

CONTINENTAL LAWYERS TITLECOMPANY, a corporation; LAWYERS TITLE INSURANCE CO., a corporation; JOHN FURNISH, an individual; and DOES 1-100, inclusive,
Defendant.

April 16, 1998, filed

STATEMENTOF DECISION

The above entitled matter came on regularly for trial on December 8, 1997 and was tried on December 8 and December 9, 1997. Plaintiff appeared by its attorney Robert M. Grandon. Defendants appeared by their attorney. Marc E. Rohatiner of the law firm Wolf, Rifkin & Shapiro, LLP. Post trial briefs were submitted by both parties, and, upon conclusion of the briefing on January 5, 1998. the court took the miner under submission. The court issued its Tentative Decision pursuant to Rule 232 on February 5, 1998, and, after the court relieved defendants from their failure timely to file proposals for the statement of decision, plaintiff submitted a proposed statement of decision on March 23, 1998. Defendants filed of payment shown on the card are at variance with the Note. The card showed the first payment due on October 24, 1994, a maturity date of September 14, 1995, and with the first six payments impounded, the first out-of-pocket cash payment was due on April 24, 1995. Furnish made monthly payments of $5,666.66 to Talbert Financial in June, July, and August 1995, [Exhs. 59, 65-67], and then refinanced the Note, which, according to the payment card, was due in full on September 14, 1995. In

connection with the payoff of the Furnish Note with the proceeds of the refinancing loan, the defendant Continental Lawyers Title Co. ("Continental") was selected as the title insurer for the new lender. Continental also handled the payoff of the Furnish Note, and issued its check to Talbert Financial in the amount of $429,327.58. [Exh. 7.] The parties entered into a stipulation that the assignment of the Deed of Trust to Summit Financial was shown on Continental's preliminary title report.

Plaintiff never received any of the monies paid on the Furnish Note. Talbert is defunct. Plaintiff seeks recovery from Continental of the amount it paid to Talbert on the refinance transaction. Other facts will be added as needed.

II. CONTINENTAL IS LIABLE FOR NEGLIGENCE.

A. Continental's Breach of Duty.

Plaintiffs second cause of action alleges an entitlement to damages from Continental for negligence. The court concludes that a breach of the duty of care has been established by the evidence and the law.

The case of Kirby v. Palos Verdes Escrow Company. Inc., 183 Cal.App.3d 57 (1986), is squarely on point with respect to the duty imposed on Continental. In Kirby, Universal Financial was in the business of borrowing money from customers, and investing the customer's money by making loans in its own name to third parties secured by deeds of trust. Universal's services included credit processing services including payment and pay-off processing and reconveyancing. Universal would, however, assign the notes and trust deeds received from third parties to its original as security for Universal's obligation to the customers.

The business of Universal, as described by the Kirby court, was nearly identical to the business of Talbert Financial in the case at bar. The only difference between the function of Universal in the Kirby case and Talbert Financial in the case

at bar is that, according to Michael Taylor, Summit Financial bought the third party loan outright, rather than taking an assignment of the third party note and trust deed as security for a loan to Talbert. But that difference is imnaterial for the analysis that follows.

In Kirby, when the Pierces, as the third party borrower, arranged to pay off the note to Universal with the proceeds of a refinancing, the escrow holder, Palos Verdes Escrow, paid Universal, not Kirby, the customer who had advanced the money to Universal and who had received an assignment of the Pierce note and trust deed as security. The evidence also disclosed that Palos Verdes had reviewed a title report before making the payment to Universal that showed Kirby as the assignee of record. On these facts, Palos Verdes Escrow was found liable to Kirby in negligence for the amount owing to Kirby on the original loan to Universal.

In the case at bar, Summit is precisely in the position held by Kirby in the Kirby case. Continental is in nearly the same position as Palos Verdes Escrow. the only difference being that Continental acted as a sub-escrow of Beverly Hills Escrow, whole Palos Verdes Escrow was the direct escrow agent of the parties to the refinancing transaction.

Nevertheless, Continental was, in fact, an escrow holder. It did act as a third person to hold property until the happening of a specified event. It obviously received the funds of the refinancing lender to deliver to (payoff) the previous lender at such time as it was satisfied that it could issue a title policy with a level of risk acceptable to itself. Clearly, Continental was not authorized to deliver the refinance proceeds until the happening of a specified event, i.e., its decision that it would accept the title risk. Paying out the proceeds without being ready, willing, and able to issue a title policy would clearly have violated Continental's duty as an escrow.

Continental argues that it was instructed by Beverly Hills, the principal escrow, to pay off Talbert in satisfaction of the item on the preliminary title report showing Summit as the

beneficiary of record. But that is precisely the unavailing argument made by Palos Verdes Escrow in the Kirby case. The Kirby court held that when Palos Verdes Escrow faced an instruction by a party to the escrow to payoff Universal, while at the same time having notice that Universal hac assigned its interest, it "was equivalent to the receipt of new escrow instructions regarding the party to be paid." 183 Cal.App.3d at 65. "Such 'new' instructions conflicted with the [third party borrowers] verbal instructions to pay Universal. This conflict should have alerted defendant to a potential problem in paying Universal rather than the Kirbys, and vice versa. As the escrow holder faced with conflicting instructions. Palos Verdes had the duty to delay payment of escrow funds until such time as the proper payee was identified." 163 Cal.App.3d 65-66 (emphasis added). Thus, assuming that Beverly Hills Escrow, as a party to the sub-escrow with Continental, did instruct Continental to pay Talbert, Continental, having knowledge of the assignment to Summit, likewise had a duty to delay payment of the funds until such time as the proper payee could be identified.

Even Mr. Church, the defendants' expert, acknowledged that had he been faced with this problem, he would have made further inquiry before disbursing the funds. Continental's failure to do so breached the standard of care imposed upon it as an escrow holder.

Continental argues in its objections to the proposed statement of decision that the court has failed to consider that Continental had no duty to Summit as a title insurer, that Continental did not act as the escrow, and that thc payoff demand from Talbert was provided to Continental by the escrow with instructions to satisfy the demand. Of course, the court has never suggested that Continental had a duty to Summit as a title insurer. There is no reason to discuss the issue because it is a non-issue. The court has discussed Continental's status as a sub escrow above. And Continental seriously misses the mark when it fails to recognize that under Kirby, the instruction from the main escrow to satisfy the demand is merely one of the conflicting instructions

which imposed the duty of further inquiry upon Continental.

B. Defendant's Negligence Was The Legal Cause of Damage to Plaintiff.

Defendant argues that compelling circumstantial evidence was presented to establish that Talbert, in fact, had actual authority to collect the payoff on behalf of Summit. If that is so, defendant argues, it paid the proper party, i.e., payment to Talbert was not a cause of damage to plaintiff. This argument presumes that if Continental had made the inquiry required of it under the duty established by Kirby. it would bave discovered that Talbert was authorized to receive the payoff, and thus the breach of the duty to inquire was not a cause of damage. Alternatively. Continental argues that Talbert was the ostensible agent of Summit, and that it was entitled to rely on this ostensible agency in paying off Talbert rather then Summit. The court is not persuaded by either of these arguments.

1. The Evidence is Insufficient to Establish That Talbert Was the Actual Agent of Summit at the Time of the Payoff.

Defendant Continental argues that circumstantial evidence establishes that Talbert was the actual agent of Summit, duly authorized to receive funds on Summit's behalf, at the time of the loan payoff. See Closing Brief of Defendants, pp. 7-15. Analysis of that evidence, however, reveals that except for the failure of Summit to give notice of the assignment, the remaining evidence either has to do with the words or conduct of Talbert, not Summit, or that there is another inference which may be drawn equally from the evidence. It is axiomatic that "[t]he extrajudicial declarations of one assuming to act as an agent cannot be introduced in evidence to prove the agency, unless made in the presence of, or communicated to and acquiesced in by, the principal." 2 Witkin, Summary of Cal. Law, Agency and Employment, §38 (emphasis in original).

Review of each item of circumstantial evidence offered by

Continental, and again, except for the lack of notice by Summit of the assignment, confirms that the evidence is insufficient to establish an actual agency. The fact that the Furnish Note on its face calls for payment to Talbertfn1 is consistent with a purchase and assignment of the note after it was made. A payment book being supplied to Furnish by Talbertfn2 is consistent with Taylor's testimony that Summit paid a reduced amount for the note, giving Talbert credit for the impounded payments, and, as a declaration of the purported agent is inadmissible against Summit. Similarly, the three payments made by Furnishfn3 cannot be considered as evidence of Talbert's agency because these payments resulted directly from the face of the note and the payment book supplied by Talbert, not Summit. Except for the lack of notice by Summit to Furnish, the other evidence cited by defendant, including the evidence concerning the other loans, is similarly unpersuasive that Talbert was the actual agent of Summit at the time of the loan payoff.

The single item of admissible evidence that has a tendency to show that Talbert was an actual agent of Summit is the fact that Summit never gave notice of the assignment to Furnish as the borrower. The court concludes, however, that this evidence is not sufficient to show an actual agency. It is, however, important evidence to consider on the issue of contributory negligence.

2. The Evidence is Insufficient to Establish an Ostensible Agency at the Time of the Payoff.

Continental's other argument is that Talbert was an ostensible agent. The problem with that argument, however, is that an ostensible agency is like an estoppel. It requires some act by the principal which is relied upon by the other party. See Civ. Code §2317. There is no evidence in this case showing that Continental relied on any act or conduct of Summit. Had Continental performed its duty of inquiry, it might well have an argument that the lack of notice of the assignment created an ostensible agency. But Continental's failure to make any inquiry at all precludes a finding of

ostensible agency.

3. Continental's Breach of Duty Was a Legal Cause of Damage to Summit.

As noted, based upon the evidence, it cannot be found that Continental paid the actual or ostensible agent of Summit. Continental's failure to make inquiry to determine the proper payee was a substantial factor in causing Summit's loss. The additional argument presented in Continental's objections to the proposed statement of decision is a rehash of arguments made at trial and in post trial briefs, and has already by rejected. Continental urges that the court draw inferences from several items of circumstantial evidence. None of the evidence mentioned on pages 7-9 of the objections persuades the court that Talbert was either the actual or ostensible agent of Summit at the time the payment was made on the Furnish Note. The court is not required to discuss each and every item of evidence presented in this case. It is sufficient to make findings on the material and ultimate issues and the court has done so.

C. The Fact That The Note Was, On Its Face, Payable to Talbert Does Not Exonerate Continentals and Summit is Not Collaterally Estopped From Asserting Continental's Negligence.

Continental argues in its objections to the proposed statement of decision that because the note was, on its face, payable to Talbert, and no notice of assignment was given to Furnish, that the loan was automatically satisfied when Continental paid Talbert. Further, says Continental, the bankruptcy court found that notice had not been given to Furnish and that Furnish was exonerated, thereby exonerating Continental.

Continental is attempting to equate the satisfaction of the note as to its maker, Furnish, with the satisfaction of a duty of care, the breach of which sounds in tort. While it is perfectly true that Furnish cannot be held liable on the note,

and that, indeed, the note is satisfied as to Furnish, this does mean that Continental did not commit a tort when it breached its duty by paying Talbert without making further inquiry. The bankruptcy court did not adjudicate whether Continental was negligent. It held only that Furnish's obligations under the note were satisfied. And rightly so. Furnish's funds were used to pay off the note. The problem, of course, is that Continental, by failing to make the inquiry required of it, paid the wrong party. That mistake could not be laid at Furnish's doorstep because be had no notice whatever that the note had been assigned. The bankruptcy court did not hold that Continental was not negligent in fulfilling its duty. The decision on Continental's negligence is made for the first time in this action.

III. PLAINTIFF WAS ALSO NEGLIGENT.

The Kirby case contains no discussion of contributory negligence. This defense is pleaded by Continental, however, and must be addressed.

The usual definition of negligence, as stated in BAJI 3.10, is "the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence." Likewise, contributory negligence is defined as "negligence on the part of a plaintiff which, combining with the negligence of a defendant, contributes as a cause in bringing about the injury." BAJI 3.50.

The court concludes that Summit did not use the degree of care that a reasonable person would use to look out for its own interests. Summit's failure to give actual notice to its borrower that it had purchased the loan from Talbert was also a substantial factor in bringing about its own injury. The court concludes that the negligence of Continental in failing to make inquiry to determine the proper payee in the face of conflicting information, and the negligence of Summit in failing to give notice to its borrower of the assignment were

equal. That is, 50 percent of the fault is attributed to plaintiff, and 50 percent of the fault is attributed to defendant. Accordingly, plaintiff's damages for negligence will be reduced by 50 percent

In Continental's objections, it argues that Summit's negligence should be more than 50 percent. But the court has concluded otherwise. Neither party exercised the degree of care which a reasonably prudent person in their position would exercise under similar circumstances. In the court's view, a fair apportionment is that they share the loss equally.

IV. PLAINTIFF'S DAMAGES FOR NEGLIGENCE.

The total amount of damage suffered by plaintiff by the negligence of defendant Continental, and before reduction for contributory negligence, is found to be $429,327.58, together with interest at the legal rate of 7 percent from September 12, 1995 to the date of entry of judgment, April 16, 1998, or 947 days. The prejudgment interest amounts to $77,972.95. In addition, the fact that Continental negligently paid off the wrong party resulted in Sunmñt incurring attorney fees in the bankruptcy court in the amount of $9,760. [Exhibit 6.] These fees are recoverable as damages in this negligence action against Continental. See Moe v. Transamerica Title Ins. Co., 21 Cal.App.3d 289, 303 (1971): Prentice v. North Amer. Title Guaranty Corp., 59 Cal.2d 618, 621 (1963). Reducing these amounts by 50 percent, the damages on the negligence cause of action are $258,530.27.fn4

The other attorneys fees claimed by plaintiff are not compensable in this action. The ordinary rule is that in the absence of contract or statute, each party bears their own attorney fees. The special rate applicable to the fees incurred in conducting litigation with a third party does not apply in this litigation between Summit and Continental. In addition, the other fees claimed are not adequately documented so the court is unable to conclude that the fees are compensable as special damages under the Prentice rule.

V. CONTINENTAL IS LIABLE FOR SOME ADDITIONAL AMOUNTS ON THE FIRST CAUSE OF ACTION FOR VIOLATION OF CIV. CODE §2941.

The court concludes that Continental violated section 2941 of the Civil Code by recording a release of the Summit (Talbert) trust deed without giving any notice to Summit, the beneficiary of record. Civ. Code §2941(b)(3). Accordingly, Continental is liable for any damages caused to Summit plus a statutory penalty of $300. Civ. Code §2941(d).

In considering the effect of the violation, it is important, however, to distinguish berween the damages caused by Continental's negligence, and the damages caused by the recording of the release without having given notice. The court takes judicial notice of the order of the bankruptcy court approving the sale of the Furnish residence free of any liens; and the motion of Furnish for an order disallowing Summit's claim against the sale proceeds, and the amended order disallowing Summit's claim.fn5 The court observes that Summit's claim as a secured creditor was not defeated by the recording of the release. Sufficient funds were set aside, some $746,840.72 according to the Furnish motion, to satisfy Summit as a secured creditor, if in fact it could prove its claim. Summit lost its claim against Furnish in the bankruptcy court, however, not because of the release recorded by Continental, but because of its failure to have given notice of the assignment to Furnish. This had nothing to do with the recording of the release. And, of course, the Furnish bankruptcy proceedings itself was not caused by the recording of the release.

Section 2941, however, provides a minimum statutory penalty of $300 and attorney fees. The attorney fees in the bankruptcy court were similarly incurred because of the negligence of Continental in paying off the wrong party, and are awarded on the negligence cause of action. These fees were not the result of the recording of the release in violation of section 2941. Thus, the minimum statutory penalty of $300 will be added to the judgment.

VI. REMAINING ISSUES.

Defendants must prevail on the third cause of action for constructive trust. There simpiy is no property to which a constructive trust could attach.

Defendant Furnish must prevail on all causes of action. There is no showing that Furnish was himself negligent in any respect in this transaction, no showing that Continental was an agent of Furnish, and certainly be cannot be liable for doing an act under section 2941. Similarly, defendant Lawyer's Title must prevail on all causes of action. Lawyer's Title is merely the parent company of Continental. That fact, standing alone, cannot impose liability.

The court also rejects Continental's argument on the other principal issue it identified, namely, that the assignment to Summit is void and unenforceable because Talbert was a suspended corporation as of July 1, 1994. Section 23302(d) of the Revenue and Taxation Code applies only to real property transfers. The promissory note which was not paid to Summit as the assignee is personal property. See Kirby v. Palos Verdes Escrow Company, Inc., 183 Cal.App.3d 57, 62 (1986). Continental's argument, submitted as an objection to the proposed statement of decision, is unpersuasive. While the deed of trust does create an interest in real property, and an assignment of the deed of trust is, therefore, a transfer of at least an interest in real property, the promissory note is, was, and always will be personal property. Even if the assignment of the trust deed is void under section 23302(d), the assignment of the promissory note is not void. The only role the assignment of the trust deed plays in this case is that this was the act which gave notice to Continental and thus to place it under a duty to make further inquiry, it simply doesn't matter whether the trust deed itself later turns out to be void. If the assignment of the trust deed is indeed void in the hands of Summit, this simply means that it holds an unsecured note - it does not relieve Continental of its duty of inquiry.

Continental also claims in its objections that the court failed

to "take into account the very serious credibility issues. [Objections, 10:6-7]. The court can assure Continental that it weighed the credibility of the witnesses in this case as in every case. Continental's objection is simply a disagreement with the court's conclusion.

VII. CONCLUSION.

For all of the above reasons, judgment will be for plaintiff and against defendant Continental Lawyers Title Company in the amount of $258,830.27, together with costs and disbursements. Judgment is in favor of defendants John Furnish and Lawyers Title Insurance Corporation and against plaintiff, with these defendants to recover costs and disbursements.

The form of judgment provided by Summit is not entirely satisfactory. Rather than require Summit to prepare another form, the court has prepared the judgment and it is signed and entered this date.

The clerk is directed to give notice of entry of this judgment to counsel for both parties and to mail a copy of this Statement of Decision and the Judgment to counsel for both parties.

DATED: April 16, 1998

Raymond J. Ikola
Judge of the Superior Court

Footnotes

fn1 Defendant's Closing Brief, item 1, page 7.

fn2 Defendant's Closing Brief, item 2, page 8.

fn3 Defendant's Closing Brief, item 3, page 8.
fn4 Prejudgment interest is not awarded on the attorney fees.

fn5 These documents were provided to the court as Exhibits A, B, and D, respectively to Continental's demurrer to the first amended complaint, filed on November 7, 1997.

S097344

SUPREME COURT OF CALIFORNIA

SUMMIT FINANCIAL

v.

CONTINENTAL LAWYERS

May 15, 2002, Decided

OPINION:

Rehearing Denied

Opinion Modified - no change in judgment

The fifth sentence of the third full paragraph on page 715 is modified to read as follows:

[Second, although the certainty of injury element is satisfied because the evidence supports the conclusion that Summit did not receive the funds paid to Talbert, the foreseeability of harm element does not support a duty because there is no suggestion CLTC could have foreseen that Talbert would not disburse the funds to Summit.]

02-291 (2)

~~No. 02-291~~

Supreme Court, U.S.
FILED
SEP 25 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SUMMIT FINANCIAL HOLDINGS, LTD.,

Petitioner,

v.

CONTINENTAL LAWYERS TITLE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Whether the state court's decision, which cannot be reconciled with state statutes creating a duty of due care, violates due process where it impermissibly shifts. the burden of proof and is not supported by substantial evidence.

2. Whether a title company, with actual notice of a recorded assignment of deed of trust, owe a duty of due care to the beneficiary of record, when the title company mistakenly pays the wrong party and subsequently reconveys the beneficiaries' recorded deed of trust.

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JURISDICTION

As discussed in Part I of Reasons for Denying the Petition, Petitioner failed to raise its current federal claim in the California Supreme Court and that court did not address the issue. This Court has held that it will not consider a petitioner's federal claim unless it was presented to or addressed by the state court whose decision is being presented for review. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 85 (1997); *Yee v. City of Escondido,* 503 U.S. 519, 533 (1992).

STATEMENT OF THE CASE

In August 1994, John A. Furnish ("Furnish") was the owner of residential property in Costa Mesa, California (the "Property"). Furnish obtained a personal loan in the amount of $425,000.00 from Talbert Financial, Inc. ("Talbert"), evidenced by a promissory note (the "Note") and secured by a second deed of trust recorded against the Property (the "Deed of Trust"). Concurrently with the recordation of the Deed of Trust, an assignment of the Note and Deed of Trust in favor of Petitioner was also recorded ("Assignment").

The Note expressly provided that, absent written notice to the contrary, all payments were to be made directly to Talbert. After the loan was made, Talbert sent Furnish a payment book listing Talbert's address for payment. Neither Talbert nor Petitioner provided Furnish notice of the assignment as required by California Civil Code § 2937. Nor did Talbert or Petitioner provide the notice required by the Note to pay anyone else other than Talbert.

In September 1995, Furnish refinanced the Property and paid off the loan. In the refinance transaction, Beverly Hills Escrow acted as the escrow holder. Lawyers Title Insurance Corporation, through its agent, Respondent, issued a title insurance policy to the new lender, Dundrel Securities, Inc. Respondent also acted as the sub-escrow holder in the transaction. Neither Talbert nor Petitioner were parties to the escrow.

The preliminary report reflected the Assignment. However, no party to the escrow ever instructed Beverly Hills Escrow or Respondent to send the payoff of the loan to Petitioner instead of to Talbert. Talbert was the only party to submit a beneficiary demand for payment to Beverly Hills Escrow. Beverly Hills Escrow instructed Respondent to pay Talbert's demand, which Respondent did. Talbert did not remit the funds to Petitioner.

Petitioner sued Respondent in the state court alleging negligence on the part of Respondent. Specifically, Petitioner asserted that since Respondent was aware of the Assignment from Talbert to Petitioner, Respondent was negligent in paying Talbert as opposed to Petitioner.

While that action was pending, Furnish filed for bankruptcy protection. The Bankruptcy Court entered an order to permit Furnish to sell the Property free of all liens. Petitioner filed a claim to the net proceeds. On October 2, 1997, the Bankruptcy Court entered its order disallowing Petitioner's claim because notice of assignment of the Note was not given to Furnish as required by California law and payment to Talbert extinguished the Note. Petitioner's motion for reconsideration was denied. Petitioner never appealed the order.

Thereafter, the state court matter was tried as a bench trial. The trial court concluded that Respondent owed a duty of care to Petitioner and was negligent in paying Talbert instead of Petitioner. However, the trial court attributed fifty percent fault to Petitioner and awarded Petitioner fifty percent of its alleged damages. Judgment was entered in favor of Petitioner in the amount of $258,830.27.

Respondent appealed the trial court's judgment to the California Court of Appeal, arguing in part that Petitioner was a stranger to the escrow and, therefore, Respondent did not owe Petitioner a duty of care. The Court of Appeal reversed the trial court's judgment, holding that Petitioner did not owe a duty of care to Respondent under *Biakanja v. Irving*, 49 Cal.2d 647, 650 (1958).

Petitioner petitioned the California Supreme Court for review, which was granted. Petitioner framed the issue as follows:

> Does a title company, with actual notice of a recorded Assignment of Deed of Trust, owe a duty of due care to the record owner of the trust deed when, acting as an escrow holder, it pays the wrong party during the payoff of the underlying promissory note.

[Petition for Review to the California Supreme Court, appended hereto at App. 1.]

The California Supreme Court held that Respondent did not owe a duty of due care to Petitioner in that Petitioner was not a party to the escrow and Respondent had never been instructed by a party to the escrow to pay Petitioner.

REASONS FOR DENYING THE PETITION

Petitioner contends that under California Civil Code § 1714(a), Respondent is responsible for all injury caused by its negligent conduct and that the California Supreme Court has no authority to determine a person's duty of due care. Under California law, a six-factor test is applied to determine a party's duty of care to a third party like Petitioner. *Biakanja v. Irving,* 49 Cal.2d 647, 650 (1958). In its opinion in the case at bar, the California Supreme Court, relying on long established precedent, held that "the threshold question in an action for negligence is whether the defendant owed the plaintiff a duty to use care." Petitioner argues that the California Supreme Court misinterpreted California Civil Code § 1714(a), should not have considered the threshold issue of duty to use care and should not have applied the six-factor test to conclude that Respondent owed no duty of care to Petitioner. Petitioner now argues that its due process rights were violated by the California Supreme Court's interpretation of California law.

For the following reasons, this claim is not properly presented in this case and in any event, is entirely without merit:

1. Petitioner failed to raise any federal issue in the California Supreme Court. The California Supreme Court, in turn, never discussed any federal constitutional issue. Because the California Supreme Court did not have a fair opportunity to address the federal question that is sought to be presented here, this Court should not consider Petitioner's federal claim.

2. There is no federal question presented. The California Supreme Court decision is premised

solely on its interpretation of California law. Where parties have been fully heard, even an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law.

3. The California Supreme Court decision is not erroneous. Under long-standing judicial principles, that court has the right to determine whether a duty of care exists in a particular case.

I

THE QUESTION PRESENTED IS NOT PROPERLY BEFORE THE COURT BECAUSE IT WAS NEITHER PRESENTED NOR ADDRESSED IN THE CALIFORNIA SUPREME COURT

The constitutional issue presented by Petitioner is not properly before the Court. With "very rare exceptions," this Court has adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that a federal claim will not be considered unless it was either addressed by, or properly presented to, the state court that rendered the decision that is the subject of review. *Adams v. Robertson,* 520 U.S. 83, 86 (1997); *Yee v. Escondido,* 503 U.S. 519, 533 (1992). As is evidenced from the California Supreme Court's decision appended to the Petition for Writ of Certiorari, the California Supreme Court did not address any federal issues. As stated in *Adams,* "[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." *Id.* 520 U.S. at 86. Petitioner bears the burden of defeating this assumption.

Rule 14(g)(i) of the U.S. Supreme Court rules requires Petitioner to identify in the Petition when and how the

federal questions sought to be reviewed were raised and the state court's disposition of the federal question "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Petitioner has failed to make that showing.

Nor were any federal issues presented to the California Supreme Court. Petitioner presented the following issue to the California Supreme Court: "Does a title company, with actual notice of a recorded Assignment of Deed of Trust, owe a duty of due care to the record owner of the trust deed when, acting as an escrow holder, it pays the wrong party during the payoff of the underlying promissory note." [Petition for Review to the California Supreme Court, appended hereto at 1-A.] Petitioner's basis for review before the California Supreme Court was the presence of a conflict between the Second and Fourth Appellate Districts regarding the existence of a duty of due care by an escrow holder to third parties, the analysis of which was solely premised on state law.

This Court stated in *Webb v. Webb,* 451 U.S. 493, 499 (1981):

> Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.

This Court further stated in *Webb*, that this principle of comity requires "a proper respect for state functions, . . . and a continuance of the belief that the National Government

will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* 451 U.S. at 500, citing *Younger v. Harris,* 401 U.S. 37, 44 (1971).

Since Petitioner failed to raise its federal claim in the state proceedings and the California Supreme Court failed to rule on a federal issue, this Court is without jurisdiction in this case. Even if the rule is prudential rather than jurisdictional, prudence dictates that the Petition should be denied.

II

THE CALIFORNIA STATE COURT DECISION DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BECAUSE PETITIONER HAD NOTICE AND AN OPPORTUNITY TO BE HEARD

Petitioner contends that the California Supreme Court's interpretation of a California statute violates the Due Process Clause of the Fifth Amendment. It is well established that "when parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law. . . ." *Bonner v. Gorman,* 213 U.S. 86, 90 (1909). The Tenth Circuit Court of Appeal elaborated on this principle in *State of Kansas v. Occidental Life Ins. Co.,* 95 F.2d 935 (10th Cir. 1938), *cert. denied,* 305 U.S. 603 (1938):

> The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceeding and the character of the rights which may be affected, the

> order, judgment, or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense. An order, judgment, or decree entered in such circumstances does not violate the due process clause even though it be erroneous in fact or law, or both.

Id. 95 F.2d at 937.

It has been a long standing principle of this Court that it will not review judgments of state courts that rest on state grounds. The policy underlying this principle was succinctly stated in *Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945):

> The reason is so obvious that it has rarely upon thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

Petitioner assails the California Supreme Court decision because it contends that the California Supreme Court did not properly interpret a state statute. Significantly, Petitioner does not contend that it was deprived of notice and the opportunity to be heard or that the judicial process was somehow infected with procedural irregularities. Petitioner's sole complaint rests on its dissatisfaction with the California Supreme Court's application of California law. Under these circumstances, no constitutional issue is presented.

III

THE CALIFORNIA SUPREME COURT DECISION IS NOT ERRONEOUS BECAUSE IT FOLLOWED LONG ESTABLISHED JUDICIAL PRINCIPLES IN REACHING ITS DECISION

California Civil Code § 1714(a) provides:

> Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

Petitioner contends that under California Civil Code § 1714(a), Respondent is responsible for all injury caused by its negligent conduct regardless of whether or not Respondent owed a duty of care to Petitioner under the circumstances.

Petitioner argues that the California Supreme Court misinterpreted California Civil Code § 1714(a) and should not have applied the six-factor test to conclude that Respondent owed no duty of care to Petitioner. Petitioner's argument is not supported by long established principles of negligence. Similar arguments that Section 1714(a) establishes a duty that cannot be judicially interpreted have failed. *See, e.g., Kentucky Fried Chicken of California, Inc. v. Superior Court,* 14 Cal.4th 814, 828 (1997).

The California Supreme Court, in *Li v. Yellow Cab Co. of California,* 13 Cal.3d 804, 814 (1975), stated the intent of the Legislature in enacting Section 1714 in 1872:

> [I]t was not the intention of the Legislature in enacting section 1714 of the Civil Code, as well as other sections of that code declarative of the

> common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution.

Even before the enactment of the California Civil Code in 1872, the California Supreme Court characterized negligence as "the failure to exercise that degree of care which may reasonably be expected from a person in the given individual's situation." *Gay v. Winter,* 34 Cal. 153 (1867). In fact, the Legislature, in enacting the California Civil Code in 1872 (which included section 1714), expressly provided that its provisions are to be liberally construed with a view to "effect its objects and promote justice." California Civil Code § 4. The Legislature also intended that the Civil Code, insofar as its provisions are substantially the same as existing common or statutory law, must be construed as continuations thereof and not as new enactments. California Civil Code § 5.

The California Supreme Court recognizes that under Section 1714 each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in the circumstances. *Parsons v. Crown Disposal Co.,* 15 Cal.4th 456, 472 (1997). However, the Court stated "[w]hether a given case falls within an exception to this general rule, or whether a duty of care exists in a given circumstance, is a question of law to be determined on a case-by-case basis. [citations omitted.]" The Court further noted that duty "is not an immutable fact of nature but only an expression of the sum total of those *considerations of policy* which lead the law to say

that the particular plaintiff is entitled to protection. [citations omitted, emphasis in original.]" *Id.* 15 Cal.4th at 472.

With respect to duties to strangers, the California Supreme Court has stated that "[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law." *Quelimane Company, Inc. v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 57 (1998). Under California law, a six-factor test is applied to determine a party's duty of care to a third party like Petitioner. *Biakanja v. Irving,* 49 Cal.2d 647, 650 (1958). The California Supreme Court applied the six-factor test and determined that Respondent did not owe a duty of care to Petitioner.

In short, the California Supreme Court properly analyzed whether or not Respondent owed a duty of care to Petitioner under the circumstances.

CONCLUSION

Respondent respectfully requests the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUMMIT FINANCIAL HOLDINGS, LTD. Plaintiff and Respondent, VS. CONTINENTAL LAWYERS TITLE, Defendant and Appellant.	No. _____

Fourth Appellate District No. G023428
Orange County Superior Court No. 767157
The Honorable Raymond J. Ikola, Judge

PETITION FOR REVIEW

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ISSUE PRESENTED

Does a title company, with actual notice of a recorded Assignment of Deed of Trust, owe a duty of due care to the record owner of the trust deed when, acting as an escrow holder, it pays the wrong party during the payoff of the underlying promissory note.

ARGUMENT

Appellant's LIABILITY FOR NEGLIGENCE SHOULD BE AFFIRMED SINCE THE TRIAL COURT PROPERLY FOUND APPELLANT OWED A DUTY OF DUE CARE TO THE RECORDED OWNER OF THE TRUST DEED IN ACCORDANCE WITH *KIRBY V. PALOS VERDE ESCROW COMPANY, INC.*[2]

Appellant was found liable for negligence by the trial court for paying off the wrong party despite actual knowledge

[2] A complete factual and procedural background is set forth in the Court of Appeals decision, which is attached as Appendix A.

of the recorded assignment of the promissory note and deed of trust in favor of Respondent – the exact encumbrance the payoff was intended to clear. Appellant was also held liable for its violation of Civil Code §2941 for improperly reconveying, and thereby destroying, Respondent's Trust Deed/security interest.

The Fourth Appellate District reversed the trial court, finding that, despite Appellant's actual knowledge of Respondent's interest in the subject property (including the admitted purpose of the entire payoff transaction) and Appellant's subsequent destruction of Respondent's interest, Appellant owed no duty of due care to Respondent.

In determining whether Appellant owed a duty of due care the trial court looked to the case of *Kirby v. Palos Verdes Escrow Co.*, (1986) 183 CA3d 57 for guidance.[3]

The *Kirby* court found the escrow agent liable when it had notice of an assignment and paid the assignor instead of the recorded beneficiary, just like the case at bar. The factual similarity to the instant case is significant and compelling.

The *Kirby* court, as cited by the Fourth Appellate District, discussed (quoting from *Kirby*) the exact dilemma at issue herein:

> "Receipt of notice of the assignment was equivalent to receipt of new escrow instructions regarding the party to be paid. [citation omitted] Such

[3] The trial court also noted a lack of published appellate opinions for guidance, noting that *Kirby* was the only case on point. The court of Appeals also noted *Kirby* was the central authority at issue in this case.

> "new" instructions conflicted with the Pierces verbal instructions to pay Universal. This conflict should have alerted defendant to a potential problem in paying Universal rather than the [Plaintiffs]' and *vice versa*. **As an escrow holder faced with conflicting instructions, [defendant] had the duty to delay payment of escrow funds until such time as the proper payee was identified."**

Summit, at 10, Appendix A (emphasis added)

The *Kirby* court instructed that the escrow holder should resolve the inconsistencies before acting, or it acts at its peril. This is a prudent approach approved by the trial court but soundly rejected by the Fourth Appellate District.

Respondent maintains that the Fourth Appellate District incorrectly reversed the trial courts judgment in the instant case by rejecting the reasoning of *Kirby* and ignoring the effects of the recording statutes.

The Fourth Appellate District in this matter went to great lengths to distinguish *Kirby* by sidestepping the principals of negligence relied upon by both the trial and *Kirby* courts, and looking to the law of agency as its basis for reversal.

The Fourth Appellate District ruled that Appellant was the agent of Furnish (the debtor on the promissory note and deed of trust) and that since Appellant followed the instructions given it, there could be no liability, especially to a non-party to the escrow.

The problem with the Fourth Appellate Districts reasoning on this point is that it ignores the **admitted**

knowledge of Appellant. Had Appellant merely followed orders without any knowledge of Respondent's interest the Fourth Appellate District *might* have been correct. However, from knowledge comes foreseeability of harm. In recognizing the importance of the foreseeability of harm in creating a duty of due care this court has held:

> **Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case.** *Dillon v. Legg*, (1968) 68 Cal. 2d 728 at 740; [emphasis added]

Since Appellant had actual notice of Respondent's recorded interest, it was certainly foreseeable that if due care was not used (as indeed it was not) damage would be suffered by Respondent (as both trial and appellate courts found to have been the case).

The law of negligence is clear on the issue of assumption of duty: when one undertakes to act, he must do so with due care. C.C. §1714(a); *Rowland v. Christian*, (1968) 69 C2d 108; 112. Simply stated: Appellant knew Respondent was the holder/beneficiary of record and had a right to receive the payoff funds. Appellant, (acting as escrow agent) had those very funds, and when Appellant acted to disburse those funds it had a duty to use due care so as not to damage Respondent's right to receive its payment. Appellant could have used the Kirby approach and resolved the discrepancy, but it chose haste over prudence[4],

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[4] Even Appellants own expert testified that Appellant should have initiated *some* communication to Respondent, the beneficiary of record,

(Continued on following page)

a decision which proximately caused damage to Respondent.

Another problem with the Fourth Appellate Districts opinion in *Summit* is that the court ruled that mere foreseeability of harm is not enough, by itself, to create a duty of due care. The court then went on to opine that since the Furnish/Dundrel transaction did not involve Respondent, there was less of a reason to find the existence of a legal duty of care. Unfortunately, the Court of Appeals misunderstood the transaction at issue: **The whole point of the Furnish/Dundrel loan was to payoff Respondent's encumbrance!** Thus, Respondent was a third party beneficiary to the Furnish/Dundrel agreement. By omitting this key fact the Fourth Appellate District misapplied this courts ruling in *Biakanja v. Irving (1958) 49 Cal.2d 647, 320 P.2d 16.*

In *Biakanja* this court stated (at pg. 650):

> "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of several factors . . . " [emphasis added].

Since, as demonstrated above, Respondent was directly involved in the Furnish/Dundrel transaction as a third party beneficiary the Fourth Appellate District misapplied the factors enumerated in *Biakanja*.

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before paying off a third party with no record interest. Unfortunately Appellant did not.

Since *Biankja*, this court has provided further guidance on the issue of determining whether to impose a duty of due care:

> "Rather than traditional notions of duty, **this court has focused on foreseeability as the key component necessary to establish liability**: "While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. . . . **[Foreseeability] of the risk of a primary consideration in establishing the element of duty."** (*Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 46 [emphasis added]

The misapplication of *Biakanja* by the Fourth Appellate District is critical since it is the basis for finding no duty of due care. In *Summit* the Fourth Appellate District held:

> "We hold that CLTC did not owe a duty of care to Summit under *Biakanja v. Irving, Supra, 49 Cal.2d 647*. We also conclude Kirby was incorrectly decided and should not be followed" *Summit* at pg. 23

This small paragraph from the *Summit* opinion clearly demonstrates the need for Supreme Court Review: 1) a clear conflict of published opinions and 2) a mistake in law by the court of appeals.

THIS CASE RAISES SIGNIFICANT PUBLIC POLICY ISSUES

Civil Code section 1714(a) provides that every person is responsible, not only for the results of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his property or person. By its terms, this section imposes the obligation to exercise ordinary care and skill to avoid injury to others. This court has approved and relied upon the legislatures express statement of public policy in C.C. §1714(a) stating:

> In addition, this holding is consistent with the Legislature's declaration of the basic principle of tort liability, embodied in Civil Code section 1714, that every person is responsible for injuries caused by his or her lack of ordinary care. (See *Rowland v. Christian, supra*, 69 Cal.2d at p. 119.) That section does not distinguish among injuries to one's person, one's property or one's financial interests. Damages for loss of profits or earnings are recoverable where they result from an injury to one's person or property caused by another's negligence. Recovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, should not be foreclosed simply because it is the only injury that occurs. *J'Aire Corporation, v. Gregory*, (1979) 24 Cal. 3d 799; 157 Cal. Rptr. 407

As this court has acknowledged, §1714(a) codifies a basic tenant [sic] of an ordered society and the public policy of California. This statute was the basis for the *Kirby* court's decision as well as the trial courts decision.

In this case Appellant knew of Respondent's interest and despite this knowledge, went ahead and paid the

wrong party and destroyed Respondent's security interest. It is submitted that Appellant acted in a manner substantially likely to create harm: exactly the type of immoral malfeasance the law of negligence was intended to remedy.

The Court of Appeals sanctioned this conduct, allowing contractual machinations to replace objective reasonableness as the standard to judge a miscreant's actions. This case could be used as a basis for a new trend in fraud, leaving the public and victims without remedy against those that fail to act as a reasonable and prudent person, but who follow their principal's instructions (except in the Second Appellate District which would, under *Kirby*, hold these persons liable).

The Fourth Appellate District's opinion not only lessens the basic duty to act reasonably, not a good thing in an ordered society, but at the same time renders the recording act and statutes meaningless. If a title company with actual knowledge of a beneficiary *with a recorded interest* in real property can pay the wrong party, *with no interest*, with impunity (per the ruling in *Summit*), then how can courts impose liability on anyone.

The floodgates of fraud have opened, this court must close them.

Respondent submits that the present conflict between the Second and Fourth Appellate Districts regarding the existence of a duty of due care by an escrow holder to known third parties is necessary to provide guidance to trial courts, attorneys, escrow holders and property owners.

Review and reversal are also necessary in order to maintain the viability of the recording statutes, for if actual notice of a recorded interest is not sufficient to protect a property holder, what is?

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this court grant review.

Dated: May 1, 2001

Respectfully Submitted,

/s/ Robert M. Grandon
Robert M. Grandon
Grandon & Associations
Attorneys for Respondent

APPENDIX "A"

CERTIFIED FOR PUBLICATION

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SUMMIT FINANCIAL HOLDINGS, LTD., Plaintiff and Respondent, v. CONTINENTAL LAWYERS TITLE COMPANY, Defendant and Appellant.	D036868 (Super. Ct. No. 767157) (Filed Mar. 27, 2001)

APPEAL from a judgment of the Superior Court of Orange County, Raymond J. Ikola, Judge. Reversed.

Wolf, Rifkin & Shapiro and Marc Eliot Rohatiner for Defendant and Appellant.

Doumani & Grandon, Robert M. Grandon; Callahan & Blaine and Jim P. Mahacek for Plaintiff and Respondent.

In 1994 Dr. Furnish, the maker of a promissory note secured by a deed of trust on real property in Corona Del Mar (referred to as the note, the deed of rust and the property, respectively), refinanced his secured obligations by obtaining a new loan from a new lender, a portion of the proceeds of which was to pay the note in full. Appellant Continental Lawyers Title Company (CLTC) provided escrow services for the refinance

transaction and was instructed by the parties to the escrow to pay the note by issuing a check to Talbert Financial (Talbert). CLTC followed that instruction on closing of the refinance transaction.

In this lawsuit, respondent Summit Financial Holdings, Ltd. (Summit) sued CLTC for negligence. Summit alleged that in the refinance transaction CLTC should have paid the note by issuing a check to Summit rather than Talbert because CLTC knew Talbert had assigned its rights in the note and deed of trust to Summit. The trail court, relying on *Kirby v. Palos Verdes Escrow Company, Inc.* (1986) 183 Cal.App.3d 57 (*Kirby*), concluded CLTC as escrow holder owed a duty of care to third parties, including Summit, who were not parties to the escrow; and breached that duty because CLTC, with knowledge of the assignment from Talbert to Summit, paid Talbert rather than Summit. The trial court awarded judgment to Summit against CLTC for negligence, and this appeal by CLTC followed.

Although CLTC raises numerous claims on appeal, the dispositive issue is whether *Kirby* correctly held that a stranger to the escrow is owed a duty of care by an escrow holder. We conclude an escrow holder owes a duty of care only to the parties to and participants in the escrow, and *Kirby* incorrectly held an escrow holder liable to a stranger to the escrow under a negligence theory. Because CLTC owed no duty of care to Summit, we reverse the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. The Loan

In August 1994 Furnish borrowed $425,000 from Talbert, and signed the note payable to Talbert. The note was secured by the deed of trust on the property. Both the note and the payment book given to Furnish required him to pay the monthly installments on the note to Talbert at Talbert's Orange, California address.[1]

At the same time that the deed of trust was recorded, a document entitled "Assignment of Deed of Trust" was recorded that assigned the beneficial interest under the note and deed of trust from Talbert to Summit. However, neither Talbert nor Summit gave Furnish notice of the assignment, as required by Civil Code 2937.[2]

B. The Refinance

In September 1995 Furnish obtained a new loan from Dundrel Securities (Dundrel) that was used in part to pay the note. Furnish and Dundrel employed Beverly Hills Escrow (BHE) to handle the refinancing transaction, and CLTC acted as an escrow holder in connection with issuing the title insurance for the new deed of trust securing the

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[1] Under the terms of the note, the first six monthly installments were impounded. Furnish paid three other monthly installments to Talbert in June, July and August 1995. Other than the impounded amounts and these three payments, Furnish made no payments on the note.

[2] All statutory references are to the Civil Code unless otherwise specified.

new note payable to Dundrel. Summit was not a party to the BHE escrow or the CLTC escrow.

CLTC prepared a preliminary title report noting (at item 6) that the property was encumbered by a deed of trust securing the Talbert note, and that an assignment of the note and deed of trust from Talbert to Summit had been recorded. BHE thereafter obtained a note payoff demand from Talbert specifying the outstanding balance to be paid to Talbert to fully pay the note. On September 8, 1995, BHE forwarded Talbert's payoff demand to CLTC and identified it as the "Demand for item 6 on the Preliminary Title Report."

On close of the refinancing transaction, CLTC paid Talbert from funds deposited with CLTC by Dundrel in accordance with the payoff demand and BHE's instructions. Summit did not receive these funds from Talbert.

C. The Legal Proceedings

In February 1997 Furnish filed for protection under Chapter 11 of the United States Bankruptcy Code, and in April 1997 the bankruptcy court entered an order for sale of the property free and clear of all liens. The order directed that the proceeds of the sale be used to pay the amounts owed the first trust deed holder Dundrel and amounts owed to another secured creditor, and that any purported liens on the property held by other parties, including Summit, would attach to the remaining proceeds of the sale.

In July 1997 Furnish moved in the bankruptcy court for an order disallowing Summit's lien claim on the remaining proceeds from the sale of the property. Furnish

argued the amount he paid Talbert in 1995 in the refinance transaction fully extinguished Furnish's obligations under the note. He established that he never received notice of the assignment of the deed of trust as required by section 2937, subdivision (d), and under section 2937, subdivision (f), a debtor's payment to the prior note holder before receiving notice of the assignment pro tanto extinguishes the underlying obligation. The payment to Talbert therefore fully extinguished the note. Summit opposed the motion, arguing that (1) the recorded assignment of the note and deed of trust was adequate to provide constructive notice of the transfer from Talbert to Summit, and (2) in any event Furnish received a notice that complied with section 2937, subdivision (d). The bankruptcy court concluded Furnish was not given the notice required by section 2937, subdivision (d). And the payment to Talbert extinguished the note under section 2937, subdivision (f). It therefore disallowed Summit's lien claim on the remaining proceeds for the sale of the property.

In this proceeding, Summit sought recovery from CLTC of the note payment CLTC made to Talbert, contending that CLTC was negligent by making the note payment to Talbert rather than to Summit. The trial court concluded *Kirby* was controlling and that CLTC owed a duty of care to Summit. The trial court further found that CLTC was negligent, breached its duty of care to Summit, and CLTC's negligence was a proximate cause of Summit's

injury. Accordingly, the trial court entered judgment for damages in favor of Summit against CLTC.[3]

II

ANALYSIS

A. Standard of Review

Summit argues that whether CLTC owed a duty of care to Summit involves the resolution of disputed facts, and we must therefore defer to the trial court's ruling if it is supported by substantial evidence. However, Summit cites no authority supporting that argument, and the courts have concluded that whether a duty of care exists is a question of law for the court; our review of the trial court's ruling is therefore de novo. (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1450-1451; *Delgado v. American Multi-Cinema, Inc.* (1999) 72 Cal.App.4th 1403, 1406-1407.)

B. *Kirby* Erred by Imposing on Escrow Holders a Duty of Care to Strangers to the Escrow

An escrow holder is the dual agent of, and owes duties to, the parties to the escrow. The primary duty owed by an escrow holder is to strictly and faithfully perform the instructions given to it by the parties to the escrow. (*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 674.) An escrow holder owes ancillary duties to the parties to the escrow, including a duty "to communicate to his principal knowledge acquired in the course of his

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[3] The trial court reduced the damage award sought by Summit because it concluded Summit was contributorily negligent.

agency with respect to material facts [that] might affect the principal's decision as to a pending transaction, particularly where, as here, he knows that the principal is looking to him for protection as to those very facts of which he has knowledge." (*Contini v. Western Title Ins. Co.* (1974) 40 Cal.App.3d 536, 547.) If the escrow holder breaches this obligation of disclosure, or does not exercise reasonable skill and diligence in carrying out the escrow instructions, the escrow holder can be liable to its principal for any resulting injury.(*Colonial Savings & L. Assn. v. Redwood Empire Title Co.* (1965) 236 Cal.App.2d 186, 190-191.) However, an escrow holder ordinarily incurs no liability for failing to do something not required by the escrow instructions or for a loss caused by following the escrow instructions. (*Axley v. Transamerica Title Ins. Co.* (1978) 88 Cal.App.3d 1, 9; accord, *Romo v. Stewart Title of California* (1995) 34 Cal.App.4th 1609, 1618 Fn. 9 [obligation of escrow holder limited to faithful compliance with instructions from the principal[.)

Kirby appears to be the only case that holds an escrow holder can be liable to strangers to the escrow for injuries allegedly caused by the escrow holder following its principals' instructions.[4] We conclude that the case law on which *Kirby* relied for its legal analysis does not support the conclusion it reached, and we disagree with *Kirby's* holding that an escrow holder who follows its principals'

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[4] *Kirby* appears to be the first California case to permit a stranger to the escrow to recover against the escrow holder for negligence, and this aspect of *Kirby* has not been followed by any reported California case.

instructions can be liable to strangers to the escrow under a negligence theory.[5]

In *Kirby*, the plaintiffs loaned funds to Universal and received an unsecured promissory note from Universal. Universal loaned funds to the Pierces and received a not secured by a deed of trust; Universal assigned the Pierces' note and deed of trust to plaintiffs as security for Universal's note to plaintiffs and the assignment was recorded. The Pierces opened an escrow with defendant escrow holder to refinance the note they had given to Universal. Universal submitted a pay-off demand to the escrow holder and the Pierces authorized the escrow holder to pay Universal's demand. The escrow holder paid Universal although it was aware Universal had assigned the Pierces' note to the plaintiffs. Plaintiffs later sued the escrow holder, alleging that because it was aware of the recorded assignment of the Pierces' note from Universal to plaintiffs it performed its escrow duties negligently by paying

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[5] The cases in which escrow holders have been held liable to third parties did not involve third parties who were strangers to the escrow. For example, in *Warington Lbr. Co. v. Fullerton Mtge. & Escrow Co.* (1963) 222 Cal.App.2d 706, the escrow holder entered into an agreement with the third party to pay funds to the third party upon receiving the money, and the escrow holder's liability rested on the court's conclusion that the escrow holder "was no longer merely a disbursing agent but was a principal under the agreement." (*Id.* at p. 710.) Similarly, in *Feinberg v. Intrastate Escrow Corp.* (1963) 216 Cal.App.2d 80, the plaintiff-creditor agreed to withhold levying on property in return for the agreement by both the property-owner debtor and the escrow holder to pay the plaintiff on funding of a new loan on the property. The court held the escrow holder was estopped to deny liability to the plaintiff because the escrow holder actively participated in inducing the plaintiff to detrimentally rely on the promise of payment. (*Id.* at pp.82-85.)

Universal rather than plaintiffs. (*Kirby*, *supra*, 183 Cal.App.3d at pp. 60-61.) *Kirby* held the defendant escrow holder liable to the plaintiffs on a negligence theory.

Kirby's analysis began with a review of established principles governing an escrow holder's role and duties.[6] *Kirby* recognized an escrow holder is a limited agent of the parties to the escrow, representing these principals only insofar as it carries out the escrow instructions, and that a breach of an escrow holder's duty to use reasonable skill and diligence in implementing the escrow instructions exposes it to liability for any resulting injury suffered by its principals. (*Id.* at pp. 64-65.) However, after citing numerous cases that describe the duties owed by an escrow holder to its principal, *Kirby* relied on *Builders' Control Service of No. Cal., Inc. v. North American Title Guar. Co.* (1962) 205 Cal.App.2d 68 (*Builders' Control Service*) to hold that an escrow holder owes the same obligations to nonparties to the escrow. The *Kirby* court noted that the escrow holder had constructive knowledge of the assignment of the Pierces' note from one nonparty (Universal) to another nonparty (the plaintiffs), and then stated:

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[6] In the earlier portion of its opinion, *Kirby* recognized the Pierces were entitled to pay Universal, even though Universal had assigned the Pierces' promissory note to the plaintiffs, because an obligor is entitled to pay the original obligee until the obligor receives notification of the assignment, and merely recording the assignment does not suffice as notification that required payment be made to the assignee. (*Kirby*, *supra*, 183 Cal.App.3d at pp. 62-63.) That aspect of *Kirby* is consistent with current law (see §2937, subds. (d), (f)), and validates the bankruptcy court's ruling that the payment to Talbert exonerated Furnish's liability under the note.

> "Receipt of notice of the assignment was equivalent to the receipt of new escrow instructions regarding the party to be paid. [Citing *Builders' Control Service*.] Such 'new' instructions conflicted with the Pierce's verbal instructions to pay Universal. This conflict should have alerted defendant to a potential problem in paying Universal rather than the [plaintiffs], and vice versa. As the escrow holder faced with conflicting instructions, [defendant] had the duty to delay payment of escrow funds until such time as the proper payee was identified. [Citation.]
>
> "Notwithstanding the fact that payment to Universal would have been proper under the provisions of the [Commercial Code], that act represented a violation of defendant's overriding duty as an escrow agent . . . [Defendant] may be held accountable for the loss it occasioned by negligently paying escrow funds to the wrong party." (*Kirby, supra,* 183 Cal.App.3d at pp. 65-66.)

Kirby's holding rested on its reading of *Builders' Control Service* that (1) knowledge of an escrow holder that a nonparty distributee of funds from the escrow has made an assignment of the right to receive those funds is deemed an amendment to the escrow instructions by the parties to the escrow, and (2) an escrow holder who follows the parties' instructions rather than the "deemed amended" instructions is exposed to liability even though its principals suffer no injury from the fact the escrow holder followed its principals' instructions.

Kirby's holding is flawed because *Builders' Control Service* does not stand for either legal proposition. In *Builders' Control Service,* a lender agreed to fund the owner-builder's construction of homes and deposited the

loan proceeds with the plaintiff, a fund control agent; plaintiff was to use those funds to pay the construction costs. The parties also agreed that the owner-builder would assign the proceeds from the sale of the newly constructed homes to the plaintiff fund control agent as an additional source to pay the construction costs. The defendant acted as escrow holder for the proceeds of the home sales knowing the owner builder had assigned the sales proceeds to the plaintiff fund control agent. (*Builders' Control Service, supra,* 205 Cal.App.2d at pp. 70-71.) The issue in *Builders' Control Service* was whether the escrow holder, knowing its principal had assigned the sales proceeds held by it, was obligated to disburse those proceeds to the owner's assignee, the fund control agent.

Although the *Builders' Control Service* court concluded the escrow holder was obligated to disburse the funds to the owner-builder's assignee, the principles it applied have no application to whether an escrow holder owes duties to a nonparty based on an assignment made by a stranger to the escrow to a stranger to the escrow. The *Builders' Control Service* court first noted that when a home sale escrow closed, the escrow holder held the sales proceeds as agent for the owner-builder principal. The *Builders' Control Service* court then cited section 2344 for the rule that, when a principal has assigned funds to a third party, an agent for that principal who comes into possession of those funds must surrender them to the third party. (*Id.* at p. 73.) Thus, *Builders' Control Service* stands for the proposition only that an agent's obligation to disburse proceeds held by the agent for its principal is

coextensive with the principal's obligation to disburse those proceeds to the assignee.[7]

In our view, *Kirby* misread *Builders' Control Service*. *Builders' Control Service* holds only that an agent's knowledge of an assignment by its principal obligates the agent to honor the principal's assignment;[8] *Kirby* transformed that obligation, which is founded in the law of agency, into a duty owed to honor contracts made by creditors of the principal even though the escrow holder had no agency relationship with the creditor. Moreover, the agent's obligation to the third party under *Builders' Control Service* is coextensive with the principal's obligation to the third party; *Kirby* transmuted the agent's obligation into one that is independent of the principal's obligation

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[7] The core holding of *Builders' Control Service* is confirmed by an understanding of the purpose and scope of the duties created by section 2344. As explained by the court in *Garrison v. Edward Brown & Sons* (1944) 25 Cal.2d 473, 482-483, the obligation owed by an agent under section 2344 as to funds held by the agent for its principal is limited to what the claimant would otherwise be entitled to recover from the agent's principal; the "purpose of section 2344 . . . is to avoid circuitry of action rather than to enlarge the scope of the recovery to which the claimant is entitled against the principal."

[8] *Kirby's* citation to *Builders' Control Service* as holding that receipt of notice of the assignment was equivalent to the receipt of new escrow instructions regarding the party to be paid demonstrates *Kirby's* misreading of *Builders' Control Service*. In the context of *Builders' Control Service*, the agent's receipt of notice of the assignment could be deemed the equivalent of a new instruction regarding the party to be paid because the assignment was made by the owner-builder, a party to the escrow entitled to give instructions to the escrow holder. However, *Kirby* transmuted that agency concept into a holding that transactions by strangers to an escrow can supersede and amend the instructions given by the parties to the escrow. Nothing in *Builders' Control Service* supports that remarkable conclusion.

because it held the agent liable on the note even though the principal was exonerated from further liability on the note by the payment to Universal.

An escrow holder is an agent of the parties to the escrow and is responsible for following the escrow instructions of its principals. *Kirby* is the only case of which we are aware that holds an escrow holder who follows its principal's instructions, and whose action caused no injury to the principals, can nevertheless be liable to strangers to the escrow for negligence. Because *Kirby's* holding was based on a misconstruction of existing law, we are convinced it was erroneously decided and should not be perpetuated. We therefore conclude that the trial court's judgment, to the extent it rests on *Kirby,* was erroneous and must be reversed.

C. An Escrow Holder Owes No General Duty of Care to a Nonparty Stranger to the Escrow

Summit alternatively argues the judgment was proper because all persons are liable for injuries caused by their negligent conduct. (§ 1714, subd. (a).) However, whether a duty of care exists is the foundational legal issue, and "[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 57-58 [declining to find duty].) In *Biakanja v. Irving* (1958) 49 Cal.2d 647, the court stated at page 650 that: "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the

forseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." It is the general rule that an escrow holder incurs no liability for failing to do something not required by the terms of the escrow or for a loss caused by following the escrow instructions. (*Axley v. Transamerica Title Ins. Co., supra,* 88 Cal.App.3d at p. 9.) Application of the *Biakanja* factors convince us we should not depart from this general rule.

First, the transaction CLTC undertook was not intended to affect or benefit Summit. CLTC was engaged by Dundrel and Furnish to assist them in closing a loan transaction between Dundrel and Furnish, and any impact that transaction may have had on Summit was collateral to the primary purpose of the escrow. Second, although the certainty of injury element is satisfied because the evidence supports the conclusion Summit did not receive the funds paid to Talbert, the forseeability of harm element does not support a duty because there is no suggestion CLTC could have foreseen that Talbert would default on its obligation to disburse the funds to Summit as Talbert had agreed to do under the assignment.[9]

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[9] In arguing for imposition of a duty, Summit emphasizes that CLTC knew Summit was the assignee of the note and deed of trust and knew or should have foreseen that payment to Talbert would injure Summit. However, foreseeability of financial injury to third persons is not alone sufficient to impose liability for negligent conduct. (*Quelimane Co. v. Stewart Title Guaranty Co., supra,* 19 Cal.4th 26, 57-58.)

The next two factors also militate against imposing a duty on CLTC. We do not assign moral blame to the act of paying Talbert rather than Summit where that act fulfilled CLTC's duty as an escrow holder to perform the instructions given to it by the parties to the escrow (*Vournas v. Fidelity Nat. Tit. Ins. Co., supra,* 73 Cal.App.4th at p. 674), and was an act authorized by statute (§ 2937, subds. (d), (f)). Furthermore, there is not a sufficiently close connection between the payment of Talbert and the injury suffered by Summit to warrant imposition of a duty of care. Although the payment to Talbert extinguished Furnish's obligation under the note, Summit's injury was caused by its own noncompliance with its statutory obligations (§ 2937, subd. (d)) and because Talbert breached its contractual obligation to Summit.

Finally, we decline to impose the duty advocated by Summit for reasons analogous to those articulated in *Sanchez v. Lindsey Morden Claims Service, Inc.* (1999) 72 Cal.App.4th 249. In *Sanchez,* an independent insurance adjuster was hired by the insurer to assist it in discharging the insurer's obligation to pay its insured for a loss covered by the policy. The insured sued the claims adjuster, alleging the adjuster negligently handled the claim and caused economic injury to the insured. The *Sanchez* court, applying the *Biakanja v. Irving* factors as refined by *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, explained at pages 253-255 the reasons it would not impose on the adjuster a duty of care to the insured. The *Sanchez* court noted the adjuster is subject to the control of its principals, and it is the principal that ultimately decides whether to pay the insured, and thus any injury to the insured is primarily attributable to the principal's actions. Moreover, the insurer may by contract limit its exposure to the

insured but an adjuster does not have that contractual ability; imposing a duty to the insured could create the anomaly that the adjuster is exposed to greater liability than the principal. *Sanchez* also noted that an adjuster owes a duty of loyalty to its principal; imposing a duty toward the insured would be poor policy because the conflicting obligations would interfere with the adjuster's faithful performance of its duty toward the principal. (Accord, *Gay v. Broder* (1980) 109 Cal.App.3d 66, 74-75.) Finally, the goal of deterring negligent conduct would not be significantly advanced by imposing a duty because adjusters are already deterred by the fact that the principal who hired them can seek indemnity from the adjuster for negligent conduct.

The *Sanchez* court buttressed its conclusion not to impose on the adjuster a duty of care to the insured with the observation that:

> "Our conclusion is also consistent with the general law of agency. An adjuster is an agent hired by a principal, the insurer, to investigate a claim. Agents are not liable to third parties for economic loss: 'An agent's mere failure to perform a duty owed to his principal may render him liable to third persons who rely on his undertaking where there is physical damage to person or property. [Citation.] But where the effect is merely to cause economic loss, the law does not yet recognize liability to a third person, except where a duty is created by statute.' [Citation.]" (*Sanchez v. Lindsey Morden Claims Services, Inc., supra,* 72 Cal.App.4th at p. 255, italics omitted.)

Similar considerations support our conclusion in this case. First, an escrow holder is subject to the control of its

principals, and it is the principal that issues the instructions to be followed by the escrow holder. Second, imposing a duty here would have the anomalous effect that the original debtor is exonerated from liability on his debt by his agent's payment to Talbert but the agent making that payment for its principal becomes liable on that debt. Third, imposing a duty would be poor policy because it would subject the escrow holder to conflicting obligations and interfere with its primary duty to follow its principal's instructions. Finally, the goal of deterring negligent conduct would not be significantly advanced by imposing a duty because escrow holders are already deterred by the fact that the principal who hired them can seek indemnity from the escrow holder to the extent the principal was injured by the escrow holder's negligence.

C. Conclusion

We hold that CLTC did not owe a duty of care to Summit under *Biakanja v. Irving, supra,* 49 Cal.2d 647. We also conclude *Kirby* was incorrectly decided and should not be followed. Accordingly, there is no basis for permitting Summit to recovery from CLTC.

DISPOSITION

The judgment is reversed. Appellant shall recover costs on appeal. CERTIFIED FOR PUBLICATION

/s/ McDonald
McDONALD, J.

WE CONCUR:

/s/ Nares
NARES, Acting P.J.

/s/ O'Rourke, J.
O'ROURKE, J.

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 242 S. Orange Ave, Suite 202 Brea, CA 92821.

On the date ascribed below, I served the foregoing document described as:

PETITION FOR REVIEW

on the interested parties who have appeared in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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Executed on May 4, 2001, at Brea, California.

/s/ Robert M. Grandon
Declarant

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